TRANSCRIPT OF RECORD

UPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 309

THE UNITED STATES OF AMERICA, APPELLANT

vs.

DURKEE FAMOUS FOODS, INC.

PEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

FILED AUGUST 30, 1938

UPREME COURT OF THE UNITED STATES

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In United States District Court, District of New Jersey

Benjamin F. Havens, Clerk of the District Court of the United s for the District of New Jersey, do hereby certify that the ed is a true copy of Indictment No. 7918b in U. S. vs. Durkee ous Foods, Inc., filed April 9, 1937, as the same remains of record, n file in my office.

testimony whereof, I have hereto subscribed my name and d the seal of said Court, at Trenton, in said District, this 26th of August A. D. nineteen hundred and thirty-eight.

AL] BENJAMIN F. HAVENS,
Clerk.

Per AMY D. BOND,
Deputy Clerk.

In United States District Court, District of New Jersey

Indictment

Filed April 9, 1937

the District Court of the United States of America in and for istrict of New Jersey, at the January Term thereof, in the year

e Grand Jurors of the United States of America duly empaneled, , and charged to inquire in and for the body of the said ict of New Jersey, upon their oaths present:

COUNT 1

That throughout the period extending from January 1, 1932, to ncluding December 31, 1933, Durkee Famous Foods, Inc., here- r called defendant, was and still is, a corporation of the of Illinois, having a place of business in New York, in the State w York.

That throughout said period Lehigh Valley Railroad Company ere Marquette Railway Company were, and still are, corpora- ommon carriers engaged in the transportation of property, in ate commerce, by railroad, for hire, and over and by means of espective connecting railway lines, operated a through railway for the transportation of property, including palm oil, in car- ots, from alongside vessels and other points in New York r to Chicago in the State of Illinois.

That throughout said period said common carriers had printed and had published and had filed with the Interstate Commerce Commission schedules and tariffs of rates and charges which named and showed the joint rate and charge l carriers for the transportation of palm oil, in carload lots, longside vessels and other points in said New York Harbor, id through railway route to said Chicago, to be 40 cents per unds, said rate being hereinafter referred to as the line haul

rate; that said schedules and tariffs providing said line haul ra
further provided that said line haul rate applied from points with
free lighterage limits of said New York Harbor as provided for
in accordance with certain tariffs and schedules governing the acce
ance and handling of freight, at, and for all deliveries in, said Ne
York Harbor, which said last named tariffs and schedules had be
duly printed and had been published and had been filed with th
Interstate Commerce Commission by said Lehigh Valley Railroa
Company; that said last mentioned tariffs and schedules provid
and defined free lighterage and floatage limits in said New Yo
Harbor and further provided that, when ordered by the shipper o
consignee in writing and tank barges were available, such articl
therein designated as "not lighterage free," including palm oil, wou
be handled in tank barges in lots of 240,000 pounds or more, in l
of tank cars on floats, from alongside steamship in said free ligh
erage and floatage limits in said New York Harbor as defined in sa
schedules and tariffs to the rail terminals of said Lehigh Valle
Railroad Company, the transfer from tank barges to tank cars to b
at the expense of the shipper or consignee, for which service a charg
of 2 cents per 100 pounds, hereinafter referred to as pumping charg
would be made in addition to said line haul rate; that said rate of
cents per 100 pounds and said pumping charge of 2 cents
3 per 100 pounds were the lawful rates and the only lawful rate
applicable on the shipment of palm oil hereinafter described.

4. That during said period on, to wit, August 12, 1932, said defend
ant tendered to said Lehigh Valley Railroad Company at Pier 6
North River, in the State of New York, such point being within sa
free lighterage and floatage limits of said New York Harbor as de
fined in said schedules and tariffs, together with other shipments o
palm oil weighing in excess of 240,000 pounds, a shipment of palm
oil of an aggregate weight of, to wit, 120,880 pounds, that being tw
carload lots, which said palm oil was part of a larger lot of palm oil
theretofore transported to said New York Harbor by a certain vessel
to wit, S. S. "Georgic," with directions to transport said 120,88
pounds of palm oil from said Pier 60 in said New York Harbor over
said connecting railway lines, to said Chicago, consigned to said
defendant.

5. That during said period on, to wit, August 5, 1932, said defend
ant did order in writing from said Lehigh Valley Railroad Company
tank barges in lieu of tank cars on floats for the handling from along
side said vessel in said New York Harbor to the rail terminal of said
Lehigh Valley Railroad Company at Claremont Terminal in the
State of New Jersey, of said lots of palm oil which had been trans
ported as aforesaid to said New York Harbor by said vessel.

6. That said Lehigh Valley Railroad Company did thereupon, a
said Pier 60, accept delivery of said 120,880 pounds of palm oil
4 and, tank barges being then and there available, did handle, by
and through its agent, Manhattan Lighterage Corporation, a

tion of the State of New York, said lot of palm oil by tank rom said Pier 60 to said rail terminal at said Claremont Ter- nd at said Claremont Terminal did pump, by and through its aid Manhattan Lighterage Corporation, said palm oil into railway tank cars bearing the initials and numbers ISTX 227 TX 285; that thereafter said common carriers did transport oad said shipment loaded in and upon said railway tank cars, esaid, over said connecting railway line, and in and through trict of New Jersey and within the jurisdiction of this Court, Chicago, and did deliver said shipment at said Chicago to fendant and did collect from said defendant freight charges mount of, to wit, $483.54, based only upon the aforesaid line te of 40 cents per 100 pounds and said weight of, to wit, 120,880

at on, to wit, August 17, 1932, said Manhattan Lighterage ation, pursuant to an arrangement and agreement theretofore ith said defendant, and with intent secretly to assume and for the benefit of said defendant, said pumping charge of 2 r 100 pounds provided in said schedules and tariffs and appli- pon said shipment of palm oil, did pay and cause to be paid Lehigh Valley Railroad Company, said pumping charge in of, to wit, $24.18, being at the rate of 2 cents per 100 pounds he aforesaid weight of, to wit, 120,880 pounds.

hat said defendant did pay, for the transportation including aid pumping of the oil from tank barge to tank cars, said um of $483.54, and only said sum of $483.54 instead of the law- ful aggregate freight charge, applicable under the aforesaid and schedules, of, to wit, $507.72, based and computed upon e haul rate of 40 cents per 100 pounds, and said weight of, to 0,880 pounds, plus said pumping charge of 2 cents per 100 , and said weight of, to wit, 120,880 pounds; and said defend- refrain from paying said common carriers or either of them, other person or corporation, said pumping charge of 2 cents pounds, applicable upon said shipment of palm oil under and e of said tariffs and schedules.

at on, to wit, August 17, 1932, Durkee Famous Foods, Inc., nt aforesaid, in the District of New Jersey and within the tion of this Court, well knowing the premises aforesaid, un- y did knowingly, by means of the device aforesaid, solicit, and receive a concession of 2 cents per 100 pounds in respect transportation of the aforesaid shipment of property by said n carriers in interstate commerce, whereby said property was rted from said point in New York Harbor to said Chicago ss rate and charge than that named and provided in the es and tariffs of said common carriers published and filed as id; contrary to the form of the statute in such case made ovided and against the peace and dignity of the United

6

COUNT 2

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs number 1, 2 and 3 of the first count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

2. That during said period on, to wit, August 12, 1932, said defendant tendered to said Lehigh Valley Railroad Company at Pier 60, North River, in the State of New York, such point being within said free lighterage and floatage limits of said New York Harbor as defined in said schedules and tariffs, together with other shipments of palm oil weighing in excess of 240,000 pounds, a shipment of palm oil of an aggregate weight of, to wit, 121,000 pounds, that being two carload lots, which said palm oil was part of a larger lot of palm oil theretofore transported to said New York Harbor by a certain vessel, to wit, S. S. "Georgie", with directions to transport said 121,000 pounds of palm oil from said Pier 60 in said New York Harbor over said connecting railway lines, to said Chicago, consigned to said defendant.

3. That during said period on, to wit, August 5, 1932, said defendant did order in writing from said Lehigh Valley Railroad Company tank barges in lieu of tank cars on floats for the handling from alongside said vessel in said New York Harbor to the rail terminal of said Lehigh Valley Railroad Company at Claremont Terminal in the State of New Jersey, of said lots of palm oil which had been transported as aforesaid to said New York Harbor by said vessel.

4. That said Lehigh Valley Railroad Company did thereupon, at said Pier 60, accept delivery of said 121,000 pounds of palm oil and said tank barges being then and there available, did handle, by and through its agent, Manhattan Lighterage Corporation, a corporation of the State of New York, said lot of palm oil by tank barge from said Pier 60 to said rail terminal at said Claremont Terminal, and at said Claremont Terminal did pump, by and through its agent, said Manhattan Lighterage Corporation, said palm oil into certain railway tank cars bearing the initials and numbers ISTX 267 and ISTX 194; that thereafter said common carriers did transport by railroad said shipment loaded in and upon said railway tank cars, as aforesaid, over said connecting railway line, and in and through the District of New Jersey and within the jurisdiction of this Court, to said Chicago, and did deliver said shipment at said Chicago to said defendant and did collect from said defendant freight charges in the amount of, to wit, $484.00, based only upon the aforesaid line haul rate of 40 cents per 100 pounds and said weight of, to wit, 121,000 pounds.

5. That on, to wit, August 17, 1932, said Manhattan Lighterage Corporation pursuant to an arrangement and agreement theretofore made with said defendant, and with intent secretly to assume and absorb for the benefit of said defendant said pumping charge

of 2 cents per 100 pounds provided in said schedules and tariffs and applicable upon said shipment of palm oil, did pay and to be paid to said Lehigh Valley Railroad Company, said pumpharge in the sum of, to wit, $24.20, being at the rate of 2 cents 00 pounds upon the aforesaid weight of, to wit, 121,000 pounds. That said defendant did pay, for the transportation including umping of the oil from tank barge to tank cars, said sum of $484.00 nly said sum of $484.00 instead of the lawful aggregate freight e, applicable under the aforesaid tariffs and schedules, of, to 508.20, based and computed upon said line haul rate of 40 cents 00 pounds, and said weight of, to wit, 121,000 pounds, plus said ing charge of 2 cents per 100 pounds, and said weight of, to wit, 00 pounds; and said defendant did refrain from paying said non carriers or either of them, or any other person or corporation, pumping charge of 2 cents per 100 pounds, applicable upon said nent of palm oil under and by virtue of said tariffs and schedules. That on, to wit, August 17, 1932, Durkee Famous Foods, Inc., dant aforesaid, in the District of New Jersey and within the diction of this Court, well knowing the premises aforesaid, unully did knowingly, by means of the device aforesaid, solicit, t, and receive a concession of 2 cents per 100 pounds in respect e transportation of the aforesaid shipment of property by said non carriers in interstate commerce, whereby said property was ported from said point in New York Harbor to said Chicago ess rate and charge than that named and provided in the schedand tariffs of said common carriers published and filed as afore; contrary to the form of the statute in such case made and ided and against the peace and dignity of the United States.

COUNT 3

d the Grand Jurors aforesaid, upon their oaths aforesaid, do ier present:

The facts set forth in paragraphs number 1, 2, and 3 of the count of this indictment, which said facts are hereby referred d incorporated in this count as fully as if they were herein ted.

That during said period on, to wit, August 12, 1932, said dent tendered to said Lehigh Valley Railroad Company at Pier lorth River, in the State of New York, such point being within free lighterage and floatage limits of said New York Harbor fined in said schedules and tariffs, together with other shipments alm oil weighing in excess of 240,000 pounds, a shipment of oil of an aggregate weight of, to wit, 120,940 pounds, that two carload lots, which said palm oil was part of a larger f palm oil theretofore transported to said New York Harbor by tain vessel, to wit, S. S. "Georgic," with directions to transport 120,940 pounds of palm oil from said Pier 60 in said New York or over said connecting railway lines, to said Chicago, con-d to said defendant.

3. That during said period on, to wit, August 5, 1932, said defendant did order in writing from said Lehigh Valley Railroad Company tank barges in lieu of tank cars on floats for the handling of alongside said vessel in said New York Harbor to the rail terminal of said Lehigh Valley Railroad Company at Claremont Terminal in the State of New Jersey, of said lots of palm oil which had been transported as aforesaid to said New York Harbor by said vessel.

10 4. That said Lehigh Valley Railroad Company did thereupon, at said Pier 60, accept delivery of said 120,940 pounds of palm oil and, tank barges being then and there available, did handle, by and through its agent, Manhattan Lighterage Corporation, a corporation of the State of New York, said lot of palm oil by tank barge from said Pier 60 to said rail terminal at said Claremont Terminal, and at said Claremont Terminal did pump, by and through its agent, said Manhattan Lighterage Corporation, said palm oil into certain railway tank cars bearing the initials and numbers ISTX 417 and ISTX 422; that thereafter said common carriers did transport by railroad said shipment loaded in and upon said railway tank cars, as aforesaid, over said connecting railway lines and in and through the District of New Jersey and within the jurisdiction of this Court, to said Chicago, and did deliver said shipment at said Chicago to said defendant and did collect from said defendant freight charges in the amount of, to wit, $483.76, based only upon the aforesaid line haul rate of 40 cents per 100 pounds and said weight of, to wit, 120,940 pounds.

5. That on, to wit, August 17, 1932, said Manhattan Lighterage Corporation pursuant to an arrangement and agreement theretofore made with said defendant, and with intent secretly to assume and absorb for the benefit of said defendant said pumping charge of 2 cents per 100 pounds provided in said schedules and tariffs and applicable upon said shipment of palm oil, did pay and cause to be paid to said Lehigh Valley Railroad Company, said pumping charge in the sum of, to wit, $24.19, being at the rate of 2 cents per 100 pounds upon the aforesaid weight of, to wit, 120,940.

11 6. That said defendant did pay, for the transportation including said pumping of the oil from tank barge to tank cars said sum of $483.76, and only said sum of $483.76 instead of the lawful aggregate freight charge, applicable under the aforesaid tariffs and schedules, of, to wit, $507.95, based and computed upon said line haul rate of 40 cents per 100 pounds, and said weight of, to wit, 120,940 pounds, plus said pumping charge of 2 cents per 100 pounds and said weight of, to wit, 120,940 pounds; and said defendant did refrain from paying said common carriers or either of them, or any other person or corporation, said pumping charge of 2 cents per 100 pounds, applicable upon said shipment of palm oil under and by virtue of said tariffs and schedules.

7. That on, to wit, August 17, 1932, Durkee Famous Foods, Inc., defendant aforesaid, in the District of New Jersey and within the

iction of this Court, well knowing the premises aforesaid, unlly did knowingly, by means of the device aforesaid, solicit, , and receive a concession of 2 cents per 100 pounds in respect transportation of the aforesaid shipment of property by said on carriers in interstate commerce, whereby said property was orted from said point in New York Harbor to said Chicago, ss rate and charge than that named and provided in the schedad tariffs of said common carriers published and filed as aforecontrary to the form of the statute in such case made and led and against the peace and dignity of the United States.

COUNT 4

the Grand Jurors aforesaid, upon their oaths aforesaid, do r present:

he facts set forth in paragraphs number 1, 2 and 3 of the first of this indictment, which said facts are hereby referred to and orated in this count as fully as if they were herein repeated.

hat during said period on, to wit, August 12, 1932, said defendndered to said Lehigh Valley Railroad Company at Pier 60, River, in the State of New York, such point being within ee lighterage and floatage limits of said New York Harbor ned in said schedules and tariffs, together with other shipments n oil weighing in excess of 240,000 pounds, a shipment of palm an aggregate weight of, to wit, 120,120 pounds, that being two l lots, which said palm oil was part of a larger lot of palm retofore transported to said New York Harbor by a certain to wit, S. S. "Georgic," with directions to transport said pounds of palm oil from said Pier 60 in said New York r over said connecting railway lines, to said Chicago, con- to said defendant.

hat during said period on, to wit, August 5, 1932, said defendl order in writing from said Lehigh Valley Railroad Comank barges in lieu of tank cars on floats for the handling from de said vessel in said New York Harbor to the rail terminal Lehigh Valley Railroad Company at Claremont Terminal State of New Jersey, of said lots of palm oil which had been ransported as aforesaid to said New York Harbor by said vessel.

4. That said Lehigh Valley Railroad Company did thereupon, at said Pier 60, accept delivery of said 120,120 pounds of il and, tank barges being then and there available, did handle, through its agent, Manhattan Lighterage Corporation, a corn of the State of New York, said lot of palm oil by tank from said Pier 60 to said rail terminal at said Claremont al, and at said Claremont Terminal did pump, by and through it, said Manhattan Lighterage Corporation, said palm oil into railway tank cars bearing the initials and numbers ISTX 43 TX 306; that thereafter said common carriers did transport road said shipment loaded in and upon said railway tank cars, esaid, over said connecting railway line, and in and through the

District of New Jersey and within the jurisdiction of this Court, to said Chicago, and did deliver said shipment at said Chicago to said defendant and did collect from said defendant freight charges in the amount of, to wit, $480.48, based only upon the aforesaid line haul rate of 40 cents per 100 pounds and said weight of, to wit, 120,120 pounds.

5. That on, to wit, August 17, 1932, said Manhattan Lighterage Corporation pursuant to an arrangement and agreement theretofore made with said defendant, and with intent secretly to assume and absorb for the benefit of said defendant said pumping charge of 2 cents per 100 pounds provided in said schedules and tariffs and applicable upon said shipment of palm oil, did pay and cause to be paid to said Lehigh Valley Railroad Company, said pumping charge in the sum of, to wit, $24.02, being at the rate of 2 cents per 100 pounds upon the aforesaid weight of, to wit, 120,120 pounds.

14 6. That said defendant did pay, for the transportation including said pumping of the oil from tank barge to tank cars, said sum of $480.48, and only said sum of $480.48, instead of the lawful aggregate freight charge, applicable under the aforesaid tariffs and schedules, of, to wit, $504.50, based and computed upon said line haul rate of 40 cents per 100 pounds, and said weight of, to wit, 120,120 pounds, plus said pumping charge of 2 cents per 100 pounds, and said weight of, to wit, 120,120 pounds; and said defendant did refrain from paying said common carriers or either of them, or any other person or corporation, said pumping charge of 2 cents per 100 pounds, applicable upon said shipment of palm oil under and by virtue of said tariffs and schedules.

7. That on, to wit, August 17, 1932, Durkee Famous Foods, Inc., defendant aforesaid, in the District of New Jersey and within the jurisdiction of this Court, well knowing the premises aforesaid, unlawfully did knowingly, by means of the device aforesaid, solicit, accept, and receive a concession of 2 cents per 100 pounds in respect of the transportation of the aforesaid shipment of property by said common carriers in interstate commerce, whereby said property was transported from said point in New York Harbor to said Chicago at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

15 COUNT 5

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs number 1, 2, and 3 of the first count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

2. That during said period on, to wit, August 12, 1932, said defendant tendered to said Lehigh Valley Railroad Company at Pier 61,

rth River, in the State of New York, such point being within said e lighterage and floatage limits of said New York Harbor as ined in said schedules and tariffs, together with other shipments of m oil weighing in excess of 240,000 pounds, a shipment of palm oil an aggregate weight of, to wit, 101,080 pounds, that being two car- d lots, which said palm oil was part of a larger lot of palm oil retofore transported to said New York Harbor by a certain sel, to wit, S. S. "Georgic," with directions to transport said ,080 pounds of palm oil from said Pier 60 in said New York rbor over said connecting railway lines, to said Chicago, consigned aid defendant.

That during said period on, to wit, August 5, 1932, said defend- id order in writing from said Lehigh Valley Railroad Company k barges in lieu of tank cars on floats for the handling from along- e said vessel in said New York Harbor to the rail terminal of l Lehigh Valley Railroad Company at Claremont Terminal in the te of New Jersey, of said lots of palm oil which had been trans- ported as aforesaid to said New York Harbor by said vessel.

4. That said Lehigh Valley Railroad Company did there- upon, at said Pier 60, accept delivery of said 101,080 pounds palm oil and, tank barges being then and there available, did dle, by and through its agent, Manhattan Lighterage Corporation, rporation of the State of New York, said lot of palm oil by tank ge from said Pier 60 to said rail terminal at said Claremont Ter- al, and at said Claremont Terminal did pump, by and through gent, said Manhattan Lighterage Corporation, said palm oil into ain railway tank cars bearing the initials and numbers ISTX 288 ISTX 320; that thereafter said common carriers did transport ailroad said shipment loaded in and upon said railway tank cars, foresaid, over said connecting railway line, and in and through District of New Jersey and within the jurisdiction of this Court, aid Chicago, and did deliver said shipment at said Chicago to defendant and did collect from said defendant freight charges he amount of, to wit, $404.32, based only upon the aforesaid line rate of 40 cents per 100 pounds and said weight of, to wit, 080 pounds.

That on, to wit, August 17, 1932, said Manhattan Lighterage poration, pursuant to an arrangement and agreement theretofore e with said defendant, and with intent secretly to assume and rb for the benefit of said defendant said pumping charge of 2 per 100 pounds provided in said schedules and tariffs and icable upon said shipment of palm oil, did pay and cause to be to said Lehigh Valley Railroad Company, said pumping charge he sum of, to wit, $20.21, being at the rate of 2 cents per 100 pounds upon the aforesaid weight of, to wit, 101,080.

6. That said defendant did pay, for the transportation in- cluding said pumping of the oil from tank barge to tank cars, sum of $404.32, and only said sum of $404.32 instead of the lawful egate freight charge, applicable under the aforesaid tariffs and

schedules, of, to wit, $424.53, based and computed upon said line haul rate of 40 cents per 100 pounds, and said weight of, to wit, 101,[illegible] pounds, plus said pumping charge of 2 cents per 100 pounds, and said weight of, to wit, 101,080 pounds; and said defendant did refrain from paying said common carriers or either of them, or any other person or corporation, said pumping charge of 2 cents per 100 pounds applicable upon said shipment of palm oil under and by virtue of said tariffs and schedules.

7. That on, to wit, August 17, 1932, Drukee Famous Foods, Inc., defendant aforesaid, in the District of New Jersey and within the jurisdiction of this Court, well knowing the premises aforesaid, unlawfully did knowingly, by means of the device aforesaid, solicit, accept and receive a concession of 2 cents per 100 pounds in respect of the transportation of the aforesaid shipment of property by said common carriers in interstate commerce, whereby said property was transported from said point in New York Harbor to said Chicago at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

JOHN J. QUINN,
United States Attorney.

The United States of America vs. Durkee Famous Foods, Inc. Indictment for Viol. Sec. 1, Elkins Act; Sec. 41, Title 49 U. S. C. A. True Bill. J. L. Williamson, Foreman. John J. Quinn, U. S. Attorney.

[File endoresment omitted.]

18 In United States District Court, District of New Jersey

Criminal No. 7,918–B

[Title omitted.]

Plea in bar to indictment

Filed June 18, 1937

This defendant, Durkee Famous Foods, Inc., by its attorney in this behalf, Roger Hinds, comes into court here, and, having heard read the said alleged indictment found at the January Term of this court in the year 1937, which said alleged indictment was filed April 2, 1937, says that the United States of America ought not further to prosecute said indictment, or any count thereof, against it, because of the following matters and things, which it pleads in bar of its prosecution for any and all of the alleged offenses therein charged, and respectfully avers as follows, to wit:

1. That the alleged offenses attempted to be set forth in each and every count of the said alleged indictment, if committed at all, were

ctment herein, during which period said defendant had not fled ice, and conseqeuntly prosecution thereof is barred by the stat- of limitations applicable thereto, 18 U. S. Code, section 582.

Defendant repeats and realleges the averments of Paragraph 1 of, and further shows that, at the April Term in the year 1934 his court, an indictment was returned by the Grand Jury, being number 6821–B, covering the same offenses attempted to be al- leged in and by the present alleged indictment. That there- after defendant filed a motion to quash the indictment returned by the April 1934 Grand Jury, and thereafter, to wit: Febru- 2, 1937, an order was entered on defendant's motion to quash indictment, reading as follows:

his matter being opened to the Court by Roger Hinds, Esq., of sel with the defendent, Durkee Famous Foods, Inc., upon the on of said defendant to quash the indictment herein and each every count thereof, and to hold the same for nought, because ame is bad for failure to allege facts constituting a crime, and sufficient in law to require the said defendant to answer thereto, due notice of said motion having been duly served upon the ed States Attorney, and the United States of America, appearing Harlan Besson, Esq., United States Attorney, Daniel H. Kunkel, Special Assistant United States Attorney, and Burt L. Smelker, Attorney for Interstate Commerce Commission, and the said ndant Durkee Famous Foods, Inc., appearing by Roger Hinds, its attorney, and the Court having heard and considered the er on argument and on the briefs of the respective counsel, and pearing that said indictment and each and every count thereof d. for failure to allege facts constituting a crime and insuf- t in law to require the defendant to answer thereto, and charges ime, and that the application of said defendant, Durkee Famous s, Inc., should be granted:

is, on this 2nd day of February 1937, ORDERED, that the indictment herein and each and every count thereof, be and me is hereby quashed and held for nought.

"GUY L. FAKE.
"*United States District Court Judge.*"

t the indictment herein, which was returned by the January Grant Jury, was not returned in conformity with 18 U. S. Code, n 587, which provides only for the return of a new indictment one has been found defective, "at any time during the next ding term of court following such finding, during which a jury thereof shall be in session", inasmuch as the next suc- ng term of court following February 2, 1937, was the April Term, not the January 1937 Term.

The defendant realleges and reaffirms the averments of Para- s 1 and 2 hereof, and further shows that, as appears from the opinion of the court upon which it made the aforesaid order

was by the court found bad in substance and the allegations thereof not to constitute a crime. The said order quashing said indictment was therefore an appealable order under 18 U. S. Code, section 682, and consequently 18 U. S. Code, section 587, has no application to such an order, but is, and is intended to be, confined to the quashing of indictments for defects of form and pleadings, which orders are not appealable under 18 U. S. Code, section 682.

All of which said defendant Durkee Famous Foods, Inc., is ready and willing to verify, and therefore pleads the same in bar of any prosecution or punishment under said indictment or any count thereof, and says that to prosecute or punish it thereunder for any of the alleged offenses charged therein is contrary to the provisions of the statute of limitations, 18 U. S. Code, section 582.

Wherefore, the defendant prays judgment that the said alleged indictment be not further prosecuted against it, and that by this court it may be dismissed and discharged from the said premises without day and the said alleged indictment held for nought and quashed.

Dated, Trenton, N. J., June 18, 1937.

DURKEE FAMOUS FOODS, INC.,
Defendant,
By ROGER HINDS, *Attorney,*
Office and Post Office Address: 744 Broad Street,
Newark, New Jersey.

21 I hereby certify that the foregoing plea in bar is not interposed for delay, and in my opinion is well founded in point of law.

Dated Trenton, N. J., June 18, 1937.

_____,
Counsel for Defendant,
Durkee Famous Foods, Inc.

[File endorsement omitted.]

22 In United States District Court for the District of New Jersey

Criminal No. 7918–b

[Title omitted.]

Answer of United States to plea in bar to indictment

Filed Aug. 2, 1937

And now, August 2nd, 1937, comes the United States of America by John J. Quinn, United States Attorney in and for the District of New Jersey, and in answer to the Plea in Bar to the indictment filed April 9, 1937, in the above matter, respectfully represents:

1. That in answer to the averments contained in paragraph numbered 1. of the Plea in Bar it is admitted that the alleged offenses

et forth in each and every count of said indictment were committed
nore than three years preceding April 9, 1937, the date when said
ndictment was returned, during which period said defendant had
ot fled justice, but denies that prosecution of each and every offense
lleged to have been committed in said indictment is barred by the
statute of limitations.

3 2. That in answer to the averments contained in paragraph numbered 2. of the Plea in Bar it is admitted that at the April Term in the year 1934 of this Court an indictment was returned by the grand jury, at file No. 6831b, covering the same offenses alleged n and by the present indictment; that thereafter defendant herein iled a motion to quash said indictment returned by the April 1934 rand jury, and that thereafter on February 2, 1937, an order was ntered on defendant's motion to quash said indictment in the lanuage set out in paragraph 2 of the Plea in Bar; but denies that the ndictment herein, which was returned by the January 1937 grand ury, was not returned in conformity with 18 U. S. Code, Section 87, and further avers that under and by virtue of 18 Code, Sec. 587, imitation of prosecution of the offenses alleged in the indictment erein to have been committed by said defendant, was stayed.

3. That in answer to the averments contained in paragraph numbered 3. of said Plea in Bar it is denied that the opinion of the Court upon which the aforesaid order quashing said previous indictment was made, held that said previous indictment was bad in substance or that no offense described by 49 U. S. Code, Sec. 41, had been alleged to have been committed, but avers that said opinion holding that said previous indictment was insufficient was based upon construction of said indictment so as to demonstrate the failure of the government to allege essential facts necessary to bring

4 the offense within the provisions of 49 U. S. Code, Section 41. and in further answer it is averred that whether or not the rder made quashing said previous indictment was an appealable rder under 18 U. S. Code, Section 682 is immaterial in so far as he application of 18 U. S. Code, Section 587, is concerned.

4. And in further general answer it is averred that the indictment erein, filed April 9, 1937, is otherwise good and sufficient in law.

Wherefore, the United States of America prays that said Plea in Bar be forthwith dismissed and that said defendant be put upon its rial.

UNITED STATES OF AMERICA,
By JOHN J. QUINN,
United States Attorney.
WILLIAM F. SMITH,
Assistant United States Attorney.
DANIEL H. KUNKEL,
Special Assistant to the United States Attorney.

[File endorsement omitted.]

25 In United States District Court, District of New Jersey

Criminal No. 7918–b

UNITED STATES OF AMERICA

v.

DURKEE FAMOUS FOODS, INC.

Criminal No. 7919–b

UNITED STATES OF AMERICA

v.

MANHATTAN LIGHTERAGE CORPORATION

Criminal No. 7920–b

UNITED STATES OF AMERICA

v.

COLGATE-PALMOLIVE-PEET COMPANY

Opinion

(Filed June 27, 1938)

(On defendants' pleas in bar to indictments)

NEWARK, N. J.,
Tuesday, June 14, 1938.

Before Hon. GUY L. FAKE, U. S. D. J.

Appearances: Daniel H. Kunkel, Esq., Special Assistant to the United States Attorney, for the Government. Roger Hinds, Esq., for defendant Durkee Famous Foods, Inc. Frank M. Swacker, Esq., for defendant Manhattan Lighterage Corporation. Messrs. Wall, Haight, Carey & Hartpence, by John A. Hartpence, Esq., and Alfred F. Conway, Esq., for defendant Colgate-Palmolive-Peet Company. W. W. Heironimus, Official Reporter.

26 The COURT. (Orally, at close of argument.) The issues here arise on three indictments, to each of which pleas in bar have been filed. This memorandum will be dispositive of the three cases.

The defendants were indicted on the 9th of April, 1937, for alleged violations of the Elkins Act, Title 49, Section 41.

The acts complained of in the indictments having been committed according to the dates set forth therein, more than three years prior to the filing of the indictments, Section 582 of Title 18 of the U. S. Code provides as follows:

"No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in Section 584 of this Title, unless the

tment is found or action is instituted within three years next such offense shall have been committed."

is contended for the Government that the pleas should not be ined because Section 587 of Title 18 of the U. S. Code provides llows:

henever an indictment is found defective or insufficient for any after the period prescribed and the applicable Statute of Limitations has expired, a new indictment may be returned at any time during the next succeeding term of Court following such finding, during which the Grand Jury thereof shall be in n."

is urged that a reasonable and proper consideration of this section causes it to become effective as to the then existing term of Court, ithstanding the fact that the statute itself is silent as to the then ng term. (Citing Endlich on Interpretation of Statutes, pages tc. U. S. v. N. Y. Central Railroad, 212 U. S. 509. U. S. v. ig Coal Co., 270 U. S. 512. U. S. vs. Baltimore Post Co., 2 Fed. 761, affirmed 268 U. S. 388. Ozawa vs. U. S., 260 U. S. 178.)

unsel for the defendants argue that to so construe the statute l cause the Court to enter the sphere of the legislature and in amend the Act to read as follows:

new indictment may be returned at any time during the next eding term of court, following such finding, during which the d Jury thereof shall be in session and as well at the Term in the indictment is found defective."

reover, it is urged that Section 587 must be strictly construed se it is an exception to the Statute of Limitations.

her arguments are offered by counsel for the defense, which appin defendants' briefs. They cite the following cases to sustain their position: U. S. v. Sheldon, 2 Wheaton 119–121 and 122. U. S. vs. McElvaine, 272 U. S. 633 at 639. U. S. vs. Scherton, 285 U. S. 518 at 521–2. 16 Corpus Juris 228, section 350.

e indictments were returned by a Grand Jury sitting for the ary Term of Court on April 9, 1937, but within the time fixed w for the April Term of Court at Newark, the January Term g been extended by an order of the Court.

the time the previous indictments were quashed by this Court, ree-year Statute of Limitations had then run against the alleged es.

* * * * * *

NEWARK, N. J.,
Monday, June 27, 1938.

aring continued from June 14, 1938. Same appearances.)

COURT. (Orally, at close of argument.) At the last session, I the facts and raised the issues upon which counsel have ap- before me today. Both sides have been diligent in their vors to assist the Court in ascertaining the law to be followed

here. No cases have been discovered bearing upon a construction of the section of the Statute of Limitations which is here involved. This has resulted in much research in an endeavor to find an analogous situation, and upon careful consideration of the arguments presented by counsel, as well as a consideration of the cases they have
29 cited, it is my conclusion that the Court, being without power to amend the statute involved, and it appearing that the statute itself contains no ambiguity, either patent or latent, must give to the statute the generally accepted meaning of the language used therein. This leads to the inescapable conclusion that where an indictment has been found to be defective after the passage of the prescribed period of limitation, the one and only Grand Jury which can hand down a new indictment is that Grand Jury which is authorized to act at the term next succeeding the term at which the Court found the indictment to be defective; and it appearing, as it does here, that the indictments under review were not found by a Grand Jury authorized as aforesaid, the indictments must necessarily fall.

The pleas in bar are therefore sustained.

[File endorsement omitted.]

30 In United States District Court, District of New Jersey

On Plea in Bar. Criminal No. 7918–B

UNITED STATES OF AMERICA

vs.

DURKEE FAMOUS FOODS, INC., DEFENDANT

Order sustaining plea in bar

Filed June 28, 1938

This matter being opened to the Court by Roger Hinds, Esq., of counsel with the defendant, Durkee Famous Foods, Inc., upon said defendant's plea in bar to the indictment herein and each and every count thereof, and due notice to plead having been duly served upon the attorney for said defendant by the United States Attorney, and the United States of America appearing by John J. Quinn, Esq., United States Attorney, and Daniel H. Kunkel, Esq., Special Assistant United States Attorney, and the said defendant Durkee Famous Foods, Inc., appearing by Roger Hinds, its attorney, and the Court having heard and considered the matter on argument, and on the briefs of the respective counsel, and it appearing that said Plea in Bar is good and sufficient and should be sustained;

It is, on this 28 day of June, 1938, ordered that the said Plea in Bar to said indictment herein be and the same is hereby sustained, and that said indictment be not further prosecuted against said

fendant, and that said indictment be and the same is hereby accordly dismissed, discharged, held for nought and quashed.

GUY L. FAKE,
United States District Court Judge.

Consnted to as to form only:
JOHN J. QUINN,
United States Attorney.
By DANIEL H. KUNKEL,
Special Assistant United States Attorney.
[File endorsement omitted.]

In United States District Court, District of New Jersey

der continuing the January 1937 Term of Court at Trenton, New Jersey, to the April 1937 Term of Court at Newark, New Jersey

Filed April 5, 1937

It being presented to the Court by John J. Quinn, United States torney for the District of New Jersey, that certain sentences are ll pending in cases before this Court, and other business of the ited States is still pending before the Court, and application ing made,

It is, thereupon on this 5th day of April 1937, ordered that the nuary 1937 Term of this Court be and the same is hereby extended d continued during the April 1937 Term and until the further der of this Court for the following and all other purposes:

1. In order that the Grand Jury of that term may dispose of its finished business.

2. In order that the sentences set forth on the annexed list marked chedule A" and all other sentences pending before the Court may imposed.

3. In order that any other business, procedure or practice pertaing to the Court or the Government of the United States may be ansacted identically as if the January 1937 Term of Court had not pired.

FORMAN, *Judge.*

[File endorsement omitted.]

In United States District Court for the District of

New Jersey

Criminal No. 7918–B

[Title omitted.]

Petition for appeal

Filed July 25, 1938

Now comes the United States of America, plaintiff, by its counsel, d says that on June 28, 1938, this court rendered its judgment in

favor of the defendant against the plaintiff, in which judgment and proceedings had prior thereto in said cause certain errors were committed to the prejudice of the plaintiff, all of which will more fully appear from the assignment of errors herewith filed.

Wherefore, United States of America prays that an appeal may issue in its behalf to the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in said cause, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

John J. Quinn,
JOHN J. QUINN,
United States Attorney.

Dated this 25th day of July, 1938.

36 [File endorsement omitted.]

37 In United States District Court for the District of New Jersey

Criminal No. 7918–B

[Title omitted.]

Assignment of errors

Filed July 25, 1938

United States of America, plaintiff, by its counsel, now comes and in connection with its petition for an appeal, files the following assignment of errors upon which it will rely in its appeal to the Supreme Court of the United States from the final judgment rendered by this Court on June 28, 1938.

The District Court erred:

1. In sustaining the plea in bar.

2. In not overruling and dismissing the plea in bar.

3. In holding and adjudging that the statute of limitations had barred the prosecution of the offenses alleged in the several counts of the indictment.

4. In holding and adjudging that the Act of May 10, 1934 (U. S. C. Title 18, Sec. 587) did not limit the application of the statute of limitations (U. S. C., Title 18, Sec. 582) so as to permit the new indictment to be returned by the grand jury empaneled at and in session during the same term of court at which the prior indictment was found defective and insufficient.

5. In holding and adjudging that the Act of May 10, 1934 (U. S. C. Title 18, Sec. 587) was effective to stay the statute of limitations only where the new indictment is returned by a grand jury in session during the next succeeding term of court following the term

38 at which the prior indictment was found defective or insufficient.

6. In failing and refusing to construe the statutes on which the new indictment was founded as permitting the return of the new

indictment by the grand jury empaneled at and for and in session during the same term of court at which the prior indictment was found defective or insufficient.

7. In failing and refusing to construe the Act of May 10, 1934 (U. S. C. Title 18, Sec. 587) as permitting the return of the new indictment by the grand jury empaneled at and for and in session during the term of court at which the prior indictment was found defective or insufficient.

8. In failing and refusing to construe the Act of May 10, 1934 (U. S. C. Title 18, Sec. 587) as permitting the return of the new indictment by the first grand jury in session upon or following the date upon which the prior indictment was found defective or insufficient, regardless of whether such grand jury was empaneled for the same term, or the next succeeding term, or some still later term following the term of court at which the prior indictment was found defective or insufficient.

9. In entering the order of June 28, 1938, sustaining the plea in bar and dismissing and quashing the indictment.

JOHN J. QUINN,
John J. Quinn,
United States Attorney.

Dated this —— day of July 1938.

39 [File endorsement omitted.]

40 In United States District Court for the District of New Jersey

[Title omitted.]

Criminal No. 7918–B

Order allowing appeal

Filed July 25, 1938

United States of America, plaintiff, having by its counsel made and filed its petition praying an appeal to the Supreme Court of the United States from the final judgment of this Court entered June 28, 1938, and having also made and filed an assignment of errors, and having in all respects conformed to the statutes and rules of court in such case made and provided:

It is ordered and adjudged that the appeal be and the same is hereby allowed as prayed and made returnable within forty (40) days from the date hereof, and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings and papers on which said final judgment was made and entered to the Supreme Court of the United States.

This 25 day of July 1938.

JOHN BOYD AVIS,
United States District Judge.

[File endorsement omitted.]

41 [Citation in usual form showing service on Roger Hinds filed July 30, 1938, omitted in printing.]

42 In United States District Court, District of New Jersey

[Title omitted.]

No. 7918–b

Docket entries

1937

Apr. 9—Indictment for Violating Section 1, Elkins Act &c.
June 1—Ordered adjourned to June 18, 1937.
18—Plea in bar by Roger Hinds, 744 Broad St., Newark, Atty, filed.
Aug. 2—Answer of United States to plea in Bar filed.

1938

June 14—Argument on plea in bar before Judge Fake.
" —Ord. off to June 27, 1938.
27—Oral Opinion by Judge Fake sustaining plea in bar &c filed.
28—Order Dismissing Indictment, sustaining plea in bar &c " (Fk).
July 25—Petition for Appeal filed.
" —Assignment of Errors "
" —Order allowing appeal filed (Avis).
" —Statement as to Jurisdiction filed.
" —Citation issued.
30—Notice to Appellee filed.
" —Citation filed.
" —Praecipe for Transcript of Record filed.

43 In United States District Court for the District of New Jersey

[Title omitted.]

Criminal No. 7918–B

Praecipe for transcript of record

Filed July 30, 1938

To the CLERK OF THE DISTRICT COURT:

Please transmit to the Supreme Court of the United States as the transcript of record in the above entitled case, the following pleadings, documents, and records.

1. Indictment.
2. Plea in bar.
3. Answer to plea in bar.
4. Opinion of court sustaining the plea in bar.
5. Order on opinion sustaining the plea in bar and quashing the indictment.

5 (a) Order of Court extending the January 1937 Trenton Term.

6. Petition for appeal.

7. Assignment of errors.
8. Statement as to jurisdiction.
9. Order allowing appeal.
10. Notice of service on appellee of petition for appeal, order allowing appeal, assignment of errors, and statement as to jurisdiction.
11. Citation on appeal.
12. All docket entries in proper order.
13. Praecipe for transcript of record.
14. Clerk's certificate.

John J. Quinn,
JOHN J. QUINN,
United States Attorney.

Service of a copy of the above praecipe is hereby acknowledged this th day of July 1938.

ROGER HINDS,
Attorney for Defendant.

[File endorsement omitted.]

[Clerk's certificate to foregoing transcript omitted in printing.]

In United States District Court, District of New Jersey

Indictment

In the District Court of the United States of America in and for e District of New Jersey, at the April Term thereof, in the year 34.

The Grand Jurors of the United States of America duly empaneled, orn and charged to inquire in and for the body of the said District New Jersey, upon their oaths present:

COUNT 1

1. That throughout the period extending from January 1, 1932, to nd including September 30, 1933, Durkee Famous Foods, Inc., hereafter called defendant, was and still is, a corporation of the State Illinois, having a place of business in New York, in the State of ew York.

2. That throughout said period Manhattan Lighterage Corporaon was and still is a corporation of the State of New York, and as engaged, among other things, in the operation of tank barges in ew York Harbor and in the business of transporting by tank barge ertain bulk fluid commodities to wit, palm oil, cocoanut oil, olive oil ots, china wood oil, perilla oil, soya bean oil, fish oil, and molasses, rom alongside steamship and other points in said New York Harbor o the railway lines and rail terminals of common carriers by railroad ocated at points contiguous to New York Harbor.

3. That throughout said period Lehigh Valley Railroad Company and Pere Marquette Railway Company, were and still are corporation common carriers engaged in the transportation of property, in interstate commerce, by railroad, for hire, and over and by means
47 of their respective connecting railway lines, operated a through railway route for the transportation of property including palm oil, in carload lots, from alongside vessels and other points in said New York Harbor to a certain point on the line of said Pere Marquette Railway Company, to wit, Chicago in the State of Illinois.

4. That throughout said period said common carriers had printed and had published and had filed with the Interstate Commerce Commission schedules of tariffs of rates and charges which showed a joint rate and charge of said carriers for the transportation of palm oil, in carload lots, from said New York Harbor to said Chicago, over said through railway route, of 40 cents per 100 pounds; that said schedules and tariffs providing said rate of 40 cents per 100 pounds further provided that said rate applied from points within free lighterage limits of said New York Harbor as provided for and in accordance with certain tariffs and schedules of rules, regulations and charges governing the acceptance and handling of freight at, and for all deliveries in, said New York Harbor, which said tariffs and schedules had been duly printed and had been published and had been filed with the Interstate Commerce Commission by said Lehigh Valley Railroad Company; that said last mentioned tariffs and schedules provided and defined free lighterage and floatage limits in said New York Harbor to be:

North River:

New York side—Battery to 135th Street.

48 New Jersey Side—National Storage Docks, Communipaw, to and including Fort Lee, N. J.

East River and Harlem River:

New York Side—Battery to Jerome Avenue Bridge, including Harlem River side of Ward's and Randall's Islands.

Brooklyn side—From Pot Cove, Astoria to and including Newtown and Dutch Kills Creeks, and points in Wallabout Canal, and to Hamilton Avenue Bridge, Gowanus Canal, and to and including 69th Street, South Brooklyn (Bay Ridge).

New York Bay:

Points on north and east shore of Staten Island between Bridge Creek (Arlington) and Clifton, both inclusive, and including Shooter Island.

Points on the New Jersey shore of New York Bay and on the Kill von Kull between Constable Hook and Avenue C, Bayonne City, opposite Port Richmond, S. I.;

that said last mentioned tariffs and schedules further provided that property therein specified as articles "not lighterage free," including palm oil, when loaded in tank cars, would be accorded free floatage

lege in lots of six cars or over, or when loaded in less than six provided the total weight of shipments equaled or exceeded 00 pounds; that said last mentioned tariffs and schedules further ided that when such articles therein designated as "not lighter- free," including palm oil, in lots of 240,000 pounds, were handled nk barges in lieu of tank cars on floats from alongside steamship id free lighterage and floatage limits in said New York Harbor, ransfer from barges to tank cars would be at the expense of the per, for which service a charge of 2 cents per 100 pounds would ade in addition to the rate from New York; that said rate of nts per 100 pounds and said pumping charge of 2 cents per 100 ds, were the lawful rates and the only lawful rates applicable on the shipment of palm oil hereinafter described.

5. That prior to August 12, 1932, said Lehigh Valley Railroad Company and said Manhattan Lighterage Corporation entered into an agreement and arrangement whereby said Manhattan Lighterage Corporation agreed and undertook, among other gs, to furnish all necessary marine equipment and to transport nk barges of said Manhattan Lighterage Corporation all ship- ts of oils and other bulk commodities as designated by said Lehigh ey Railroad Company from designated points within said free terage and floatage limits of said New York Harbor, to designated s of said Lehigh Valley Railroad Company in the State of New ey and other points, including the pumping of shipments from barges into tank cars designated and placed by said Lehigh ey Railroad Company on and at said piers, for and at a compen- n of, to wit, 6½ cents per 100 pounds; that said arrangement and ement was in full force and effect throughout all times men- d in this indictment.

That during said period on, to wit, August 12, 1932, said de- lant tendered to said Lehigh Valley Railroad Company at Pier North River, in the State of New York, being within said free terage and floatage limits of said New York Harbor, together with r shipments of palm oil weighing in excess of 240,000 pounds, a ment of palm oil of an aggregate weight of, to wit, 120,880 nds, that being two carload lots, which said palm oil was a part of rger lot of oil theretofore transported to said New York Harbor certain vessel, to wit, "Georgic," with directions to transport 120,880 pounds of palm oil from said New York Harbor over connecting railway lines, to said Chicago, consigned to said de- lant; that said Lehigh Valley Railroad Company, by and through said agent, Manhattan Lighterage Corporation, then and there accepted delivery of said palm oil, and said Manhattan Lighterage Corporation, acting for and in behalf of said Lehigh Valley Railroad Company transported said palm oil by barge from said Pier 60 to the rail terminal of said Lehigh ley Railroad Company at Claremont Terminal in the State of Jersey and at said Claremont Terminal said Manhattan Light- ge Corporation pumped said palm oil into certain railway tank

cars, bearing the initials and numbers ISTX 227 and ISTX [illegible] that thereafter said common carriers transported said shipment loaded in and upon said railway tank cars, as aforesaid, over said connecting railway line, and in and through the District of New Jersey and within the jurisdiction of this Court, to said Chicago, and did deliver said shipment at said Chicago to said defendant and did collect freight charges in the amount of $483.54 based only upon the aforesaid rate of 40 cents per 100 pounds.

7. That the lawful freight charges applicable upon said shipment under the aforesaid tariffs and schedules was $507.72 being the sum of said line haul rate of 40 cents per 100 pounds based on the aforesaid weight of, to wit, 120,880 pounds and said pumping charge of 2 cents per 100 pounds based upon the aforesaid weight of, to wit, 120,880 pounds.

8. That in accordance with said arrangement and agreement between said Lehigh Valley Railroad Company and said Manhattan Lighterage Corporation said Manhattan Lighterage Corporation did on, to wit, August 17, 1932, pay to said Manhattan Lighterage Corporation the sum of, to wit, $78.57 for the lightering by tank barge of said palm oil from said Pier 60 to said rail termial of said Lehigh Valley Railroad Company at said Claremont Terminal and for the pumping of said palm oil from tank barge into said tank railway cars at said Claremont Terminal, said sum of, to wit, $78.57 being based and computed at said rate of 6½ cents per 100 pounds.

51 9. That on, to wit, August 17, 1932, said Manhattan Lighterage Corporation, pursuant to an arrangement theretofore made with said defendant, and with intent secretly to assume and absorb for the benefit of said defendant said pumping charge of 2 cents per 100 pounds provided in said tariffs and schedules of rules, regulations, and charges at said New York Harbor, printed, published, and filed by said Lehigh Valley Railroad Company as aforesaid, applicable upon said shipment of palm oil, paid to said Lehigh Valley Railroad Company, the sum of $24.18, being at the rate of 2 cents per 100 pounds upon the aforesaid weight of, to wit, 120,880 pounds.

10. That said Manhattan Lighterage Corporation did assume and absorb, for the benefit and advantage of said defendant, said pumping charge of 2 cents per 100 pounds.

11. That said defendant through and by means of a device employed with purpose to have said Manhattan Lighterage Corporation secretly absorb and assume said pumping charge of 2 cents per 100 pounds, for the benefit and advantage of said defendant, and thereby reduce said lawfully published and filed tariffs, rates and charges chargeable to said defendant, as aforesaid, and then and there well knowing the provisions of the aforesaid lawfully published and filed tariffs and schedules, and the premises aforesaid, on, to wit, August 17, 1932, unlawfully did knowingly solicit, accept, and receive from said Manhatton Lighterage Corporataion a concession and discrimination in the amount of 2 cents on each 100 pounds of said palm oil which was transported from said New York Harbor to said Chicago

nd in respect to said transportation, whereby said shipment of palm il was transported by railroad as aforesaid at and for a rate of 40 ents per 100 pounds, which was less than said rates aggregating 42 ents per 100 pounds named in the tariffs and schedules published and filed as aforesaid.

2 12. And so the Grand Jurors aforesaid, upon their oaths aforesaid, do present and find that said Durkee Famous Foods, nc., defendant aforesaid, in the District of New Jersey and within he jurisdiction of this court, at the time, in the manner and form nd through a device as aforesaid, unlawfully did knowingly solicit, ccept, and receive a concession and discrimination in respect to the nterstate transportation of property conducted by the common car- ie; aforesaid through said District of New Jersey, whereby said roperty was transported by said common carriers at a less rate han the published and applicable rate named in the tariffs published nd filed as aforesaid; contrary to the statute in such case made nd provided and against the peace and dignity of the United tates.

3

COUNT 2

And the Grand Jurors aforesaid, upon their oaths aforesaid, do urther present:

1. The facts set forth in paragraphs number 1, 2, 3, 4, and 5 of he first count of this indictment, which said facts are hereby referred o and incorporated in this count as fully as if they were herein epeated.

* * * * * * *

COUNT 3

And the Grand Jurors aforesaid, upon their oaths aforesaid, do urther present:

1. The facts set forth in paragraphs number 1, 2, 3, 4, and 5 of he first count of this indictment, which said facts are hereby referred o and incorporated in this count as fully as if they were herein epeated.

* * * * * * *

COUNT 4

And the Grand Jurors aforesaid, upon their oaths aforesaid, do rther present:

1. The facts set forth in paragraphs number 1, 2, 3, 4, and 5 of e first count of this indictment, which said facts are hereby referred and incorporated in this count as fully as if they were herein peated.

* * * * * * *

COUNT 5

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs number 1, 2, 3, 4, and 5 of the first count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were here repeated.

* * * * * * *

54

COUNT 6

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

* * * * * * *

3. That throughout said period said common carriers had printed and had published and had filed with the Interstate Commerce Commission schedules of tariffs of rates and charges which showed a joint rate and charge of said carriers for the transportation of cocoanut oil, in carload lots, from said New York Harbor to said Chicago, over said through railway route, of 40 cents per 100 pounds; that said schedules and tariffs providing said rate of 40 cents per 100 pounds further provided that said rate applied from points within free lighterage limits of said New York Harbor as provided for and in accordance with certain tariffs and schedules of rules, regulations, and charges governing the acceptance and handling of freight at, and for all deliveries in, said New York Harbor, which said tariffs and schedules had been duly printed *and had been duly printed* and had been published and had been filed with the Interstate Commerce Commission, by said Lehigh Valley Railroad Company; that said last mentioned tariffs and schedules provided and defined free lighterage and floatage limits in said New York Harbor to be

North River:

New York side—Battery to 135th Street.

New Jersey side—National Storage Docks, Communipaw, to and including Fort Lee, N. J.

East River and Harlem River:

New York side—Battery to Jerome Avenue Bridge, including Harlem River side of Ward's and Randall's Islands.

Brooklyn side—From Pot Cove, Astoria, to and including Newtown and Dutch Kills Creeks, and points in Wallabout Canal, and to Hamilton Avenue Bridge, Gowanus Canal, and to and including 69th Street, South Brooklyn (Bay Ridge).

55

New York Bay:

Points on north and east shore of Staten Island between Bridge Creek (Arlington) and Clifton, both inclusive, and including Shooter Island.

Points on the New Jersey shore of New York Bay and on the Kill von Kull between Constable Hook and Avenue C, Bayonne City, opposite Port Richmond, S. I.;

said last mentioned tariffs and schedules further provided that erty therein specified as articles "not lighterage free," including anut oil, when loaded in tank cars, would be accorded free float- privilege in lots of six cars or over, or when loaded in less than ars, provided the total weight of shipments equaled or exceeded 00 pounds; that said last mentioned tariffs and schedules further ided that when such articles therein designated as "not lighterage ," including cocoanut oil, in lots of 240,000 pounds, were handled nk barges in lieu of tank cars on floats from alongside steamship other points in said free lighterage and floatage limits in said New k Harbor, the transfer from barges to tank cars would be at the nse of the shipper, for which service a charge of 2 cents per pounds would be made in addition to the rate from New York; said rate of 40 cents per 100 pounds and said pumping charge cents per 100 pounds were the lawful rates and the only lawful s applicable on the shipment of cocoanut oil hereinafter described.

* * * * * * *

COUNT 7

nd the Grand Jurors aforesaid, upon their oaths aforesaid, do her present:

The facts set forth in paragraphs numbered 1 and 2 of the first nt, and in paragraphs numbers 2, 3, and 4 of the sixth count of indictment, which said facts are hereby referred to and incorpo- d in this count as fully as if they were herein repeated.

* * * * * * *

COUNT 8

nd the Grand Jurors aforesaid, upon their oaths aforesaid, do her present:

. The facts set forth in paragraphs numbered 1 and 2 of the first nt, and in paragraphs numbers 2, 3, and 4 of the sixth count his indictment, which said facts are hereby referred to and incor- ated in this count as fully as if they were herein repeated.

* * * * * * *

COUNT 9

nd the Grand Jurors aforesaid, upon their oaths aforesaid, do ther present:

. The facts set forth in paragraphs numbered 1 and 2 of the first nt, and in paragraphs numbers 2, 3, and 4 of the sixth count of s indictment, which said facts are hereby referred to and incor- ated in this count as fully as if they were herein repeated.

* * * * * * *

COUNT 10

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs numbered 1 and 2 of the first count, and in paragraphs numbers 2, 3, and 4 of the sixth count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

* * * * * * *

COUNT 11

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs numbered 1 and 2 of the first count, and in paragraphs numbers 2, 3, and 4 of the sixth count of this indictment, which said facts are hereby referred to and
57 incorporated in this count as fully as if they were herein repeated.

* * * * * * *

COUNT 12

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs numbered 1 and 2 of the first count, and in paragraphs numbers 2, 3, and 4 of the sixth count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

* * * * * * *

COUNT 13

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs numbered 1 and 2 of the first count, and in paragraphs numbers 2, 3, and 4 of the sixth count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

* * * * * * *

COUNT 14

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs numbered 1 and 2 of the first count, and in paragraphs numbers 2, 3, and 4 of the sixth count of

s indictment, which said facts are hereby referred to and incor-ated in this count as fully as if they were herein repeated.

* * * * * * *

COUNT 15

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs numbered 1 and 4 of the first count, and in paragraphs numbers 2, 3, and 4, of the h count of this indictment, which said facts are hereby referred and incorporated in this count as fully as if they were herein eated.

* * * * * * *

In United States District Court, District of New Jersey

UNITED STATES OF AMERICA

vs.

DURKEE FAMOUS FOODS, INC.

Motion to quash

Filed Jan. 15, 1937

omes now the defendant, Durkee Famous Foods, Inc., by Roger ds, its attorney, and, upon leave of court, withdraws its plea of guilty, heretofore interposed, and moves to quash the indictment in and each and every count thereof, because the same are insuffi-t in law to require the defendant to answer thereto, for the owing reasons:

s shown by the annexed stipulation of the plaintiff, the charge tioned in the last half of the fourth paragraph of the first nt of the indictment, and thereafter and in each of the succeeding nts of said indictment, referred to as a pumping charge contained he tariffs and schedules of the carriers mentioned in the indict-t, is provided for by a rule reading as follows:

Property loaded in tank cars will be accorded free floatage privi-s in lots of six cars or over, or when loaded in less than six cars vided the total weight of shipment exceeds or equals 240,000 nds.

When ordered by the shipper or consignee, in writing, and tank rs are available, Vegetable Oils, Foots, Settlings and Tank Bot-s and Fish, Sea Animal, Whale Oils, Linseed Oil, and Molasses ots of 240,000 pounds or more, may be handled in tank barges ieu of tank cars on floats from or to alongside steamship and

points within free lighterage limits of New York Harbor. Tra
from barges to tank cars or from tank cars to barges to be at exp
of shipper or consignee, for which service a charge of 2 cents p
100 pounds will be made in addition to the rates from or to
York."

That is, said pumping charge is applicable upon oils handled
tank barges only "when ordered by the shipper or consignee
writing"; and in no count of said indictment is it alleged th
60 the handling of said oils in tank barges was ordered in wr
ing by the shipper or consignee, and consequently each
every count of said indictment is bad for failure to allege facts co
stituting a crime.

Wherefore, this defendant respectfully prays that the said indi
ment and each and every count thereof be quashed and held
naught.

ROGER HINDS,
Attorney for Defendant,
Durkee Famous Foods, Inc.

Dated Newark, N. J., April —, 1935.

61 In United States District Court, District of New Jersey

UNITED STATES OF AMERICA
vs.
DURKEE FAMOUS FOODS, INC.

Stipulation

It is hereby stipulated by and between the United States
America, the plaintiff, and Durkee Famous Foods, Inc., the defen
ant, in the above-entitled action, that the charge mentioned in th
last half of the fourth paragraph of the first count of the indict
ment, and thereafter and in each of the succeeding counts, of sa
indictment, referred to as a pumping charge contained in the tarif
and schedules of the carriers mentioned in the indictment, is pro
vided for by a rule reading as follows:

"Property loaded in tank cars will be accorded free floatage pri
ileges in lots of six cars or over, or when loaded in less than six car
provided the total weight of shipment exceeds or equals 240,00
pounds.

"When ordered by the shipper or consignee, in writing, and tan
barges are available, Vegetable Oils, Foots, Settlings and Tank Bo
toms and Fish, Sea Animal, Whale Oils, Linseed Oil, and Molasse
in lots of 240,000 pounds or more, may be handled in tank barge
in lieu of tank cars on floats from or to alongside steamship and
points within free lighterage limits of New York Harbor. Transfe
from barges to tank cars or from tank cars to barges to be at expens
of shipper or consignee, for which service a charge of 2 cents pe

ounds will be made in addition to the rates from or to New

."

UNITED STATES OF AMERICA,
Plaintiff.

By HARLAN BESSON,
United States Attorney.
DANIEL H. KUNKEL,
Spec. Asst. U. S. Atty.
DURKEE FAMOUS FOODS, INC.,
Defendant.

By ROGER HINDS,
Attorney for Defendant.

e and timely service admitted. Harlan Besson, U. S. Atty.
l. Kunkel.
ile endorsement omitted.]

In United States District Court, District of New Jersey

On Motion to Quash Indictment No. 6821–B

UNITED STATES OF AMERICA
vs.
DURKEE FAMOUS FOODS, INC., DEFENDANT

ppearances: Harlan Besson, Esq., United States Attorney. iel H. Kunkel, Esq., Special Assistant United States Attorney. t L. Smelker, Esq., Attorney for Interstate Commerce Commis-. Opposed. Roger Hinds, Esq., Attorney for Durkee Famous ds, Inc., for the motion.

Memorandum

Filed Jan. 14, 1937

AKE, District Judge:

he indictment here is intended to charge an offense against the risions of Section 1 of the Elkins Act, Sec. 41, Title 49, U. S. C. A. he gist of the issue before me resides in the allegation in the ictment that the defendant "through a device aforesaid, unlaw-y did knowingly solicit, accept, and receive a concession and crimination in respect to interstate transportation of prop-* * * whereby said property was transported by said com-n carriers at a less rate than the published and applicable rate ed in the tariffs published and filed as aforesaid; contrary to statute in such case made and provided."

ection 41 of the Act makes it a criminal offense to "accept or ive any rebate concession, or discrimination in respect to trans-tation of any property * * * whereby any such property

shall by any device whatever be transported at a less rate than the
named in the tariffs published and filed by such carrier."
63 The indictment discloses that the rate involved is 40 cents
per hundred pounds and in addition thereto a charge of 2
cents per 100 pounds, referred to as a pumping charge. The in
here is based entirely on the 2 cent pumping charge. On this po
the indictment reads as follows: "That said defendant did assume and
absorb, for the benefit and advantage of said Durkee Famous Foods,
Inc., said pumping charge of 2 cents per 100 pounds."

This leads to an examination of the rule or tariff for the purpose
of ascertaining when and under what circumstances the 2 cent pump-
ing charge may become effective. By stipulation in writing between
the parties it is agreed that the item for pumping arises at all
under a rule reading as follows:

"Property loaded in tank cars will be accorded free floatage privileges in lots of six cars or over, or when loaded in less than six cars provided the total weight of shipment exceeds or equals 240,000 pounds.

"When ordered by the shipper or consignee, in writing, and tank barges are available, Vegetable Oils, Foots, Settlings and Tank Bottoms and Fish, Sea Animal, Whale Oils, Linseed Oil, and Molasses in lots of 240,000 pounds or more, may be handled in tank barges in lieu of tank cars on floats from or to alongside steamship and points within free lighterage limits of New York Harbor. Transfer from barges to tank cars or from tank cars to barges to be at expense of shipper or consignee for which service a charge of 2 cents per 100 pounds will be made in addition to the rates from or to New York."

It should be noted that while the indictment is found under the Elkins Act, the crime involved is not fully defined in that Act. We are compelled to look elsewhere for the factors which lead to a complete definition. We find these factors in the filed tariff (rule) and for present purposes they have the same force and effect as
64 statutory provisions. Looking then to the tariff, it will be seen, among other things, that the 2 cent charge does not become effective unless tank barges are "* * * ordered by the shipper or consignee, in writing and tank barges are available, * * *." These requirements are conditions precedent to the right to bill or assess the 2 cent charge. It, therefore, follows that no criminal concession or discrimination can be spelled out under the Elkins Act when read with the tariff unless these essential conditions are met in the language of the indictment. The indictment is silent on that subject; therefore, it charges no crime and the motion to quash must be granted.

See United States v. Cook, 84 U. S. 186; Davis v. Henderson, 266 U. S. 92; U. S. v. Olds Motor Works, 4 Fed. Supp. 65; and United States v. Wood, 159 Fed. 187.

In United States District Court, District of New Jersey

On Motion to Quash Indictment No. 6821–B

UNITED STATES OF AMERICA

vs.

DURKEE FAMOUS FOODS, INC., DEFENDANT

Appearances: Harlan Besson, Esq., United States Attorney. niel H. Kunkel, Esq., Special Assistant United States Attorney. r L. Smelker, Esq., Attorney for Interstate Commerce Commis-n. Opposed. Roger Hinds, Esq., Attorney for Durkee Famous ds, Inc., for the Motion.

norandum correcting and amending a memorandum filed in this cause on January 14, 1937

Filed Jan. 25, 1937

AKE, District Judge:

he memorandum filed by me in the above entitled cause on the day of January, 1937 is hereby corrected and amended as fol-: Strike out the paragraph on page 2 of the aforesaid memoran- which reads as follows:

The indictment discloses that the rate involved is 40 cents per dred pounds and in addition thereto a charge of 2 cents per 100 ds, referred to as a pumping charge. The issue here is based ely on the 2 cent pumping charge. On this point the indictment s as follows: 'That said defendant did assume and absorb, for the fit and advantage of said Durkee Famous Foods, Inc., said pump-harge of 2 cents per 100 pounds."

insert in lieu thereof, the following paragraph:

e indictment discloses that the rate involved is 40 cents per dred pounds and in addition thereto a charge of 2 cents per 100 ds, referred to as a pumping charge. The issue here is based en- on the 2 cent pumping charge. On this point the indictment s as follows: "That said Manhattan Lighterage Company did ne and absorb, for the advantage of said defendant, said pump-ing charge of 2 cents per 100 pounds."

[Clerk's certificate to foregoing papers omitted in printing.]

Supreme Court of the United States

Stipulation re enlargement of record, etc.

notion of defendant-appellee to enlarge the record in this matter ding thereto:

Memorandum opinion of the United States District Court filed ary 14, 1937, supporting the order referred to in the plea in bar

and answer herein quashing the previous indictment herein (Crimi... No. 6821–b).

2. Correcting memorandum opinion of said United States Distri... Court filed January 25, 1937, correcting the above mentioned opini... (Crimin... No. 6821–b).

3. ... n, including stipulation annexed thereto to quash said pr... vious ... ment, filed on or about April 3, 1935 (Criminal No. 6821-b... referred to in the plea in bar and answer herein.

4. Prior indictment herein in said United States District Cou... returned and filed at the April 1934 Term of said District Cou... (Criminal No. 6821–b).

having been granted by the Court without objection of the Solicito... General, it is hereby

Stipulated, that in so far as the said prior indictment is concerne... only the following parts need be printed:

(a) The first count in full;
(b) Paragraph "1" of Counts 2 to 5 inclusive;
(c) Paragraph "3" of Count 6;
(d) Paragraph "1" of Counts 7 to 15 inclusive.

and it is further

67 Stipulated, that the said first count is typical of all of the fifteen counts of said prior indictment. Dated: Newark, N.J. November 23, 1938.

ROBERT H. JACKSON,
Solicitor General of the United States.

ROGER HINDS,
Counsel for Appellee, Durkee Famous Foods, Inc.

68 In Supreme Court of the United States

Statement of points and designation of record to be printed

Filed Aug. 30, 1938

I

United States of America, appellant, states that in its brief and oral argument on its appeal in the above-entitled cause it will rely upon the points stated in its assignment of errors therein.

II

The entire record in this cause as filed in this Court is necessary for consideration of the points stated by appellant, and the entire transcript of record as transmitted by the Clerk of the District Court should be printed by the Clerk of this Court.

Robert H. Jackson.
ROBERT H. JACKSON,
Solicitor General.

August --, 1938.

rvice of a copy of the above Statement of Points and Designa-
of Record to be Printed acknowledged August 26, 1938.

ROGER HINDS,
Counsel for Appellee.

ile endorsement omitted.]

ndorsement on cover:] Enter: Attorney General. File No.
. New Jersey D. C. U. S. Term No. 309. The United States
merica, Appellant, vs. Durkee Famous Foods, Inc. Filed Au-
30, 1938. Term No. 309 O. T. 1938.

U. S. GOVERNMENT PRINTING OFFICE: 1938

FILE COPY

No. 3659

In the Supreme Court of the United States

OCTOBER TERM, 1956

THE UNITED STATES OF AMERICA, APPELLANT

v.

DUPONT FAMOUS FOODS, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

STATEMENT AS TO JURISDICTION

In the District Court of the United States for the District of New Jersey

CRIMINAL NO. 7918–B

UNITED STATES OF AMERICA, PLAINTIFF

v.

DURKEE FAMOUS FOODS, INC., A CORPORATION, DEFENDANT

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, United States of America submits herewith its statement showing the basis of jurisdiction of the Supreme Court of the United States to entertain an appeal in this cause.

A. The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment complained of is conferred by Title 18, Section 682, of the United States Code, otherwise known as the Criminal Appeals Act, and by Section 345, Title 28, of the United States Code.

B. The statute of the United States, the construction of which is involved herein is the Act of May 10, 1934, c. 278, 48 Stat. 772 (U. S. C. Title 18, Sec. 587) which provides so far as pertinent:

> Whenever an indictment is found defective or insufficient for any cause, after the period prescribed by the applicable statute

of limitations has expired, a new indictment may be returned at any time during the next succeeding term of court following such finding, during which a grand jury thereof shall be in session.

C. The judgment of the District Court sought to be reviewed was entered on June 28, 1938. The application for appeal was filed on July —, 1938, and the appeal was allowed on July —, 1938.

D. The indictment is in five separate counts, each of which is based on Section 1 of the Elkins Act, U. S. C. Title 49, Sec. 41 (1), and alleges that on August 17, 1932, the defendant knowingly solicited, accepted and received a concession of 2 cents per 100 pounds in respect of the interstate transportation of vegetable oil by certain specified common carriers by railroad, whereby the oil was transported at a less rate than that named in the carriers' published tariffs.

A prior indictment charging the same offenses had been returned at the April term of Court in 1934, to which a motion to quash was filed in April, 1935, and sustained by opinion filed January 14, 1937, and judgment entered February 2, 1937, during the January, 1937, term of Court.[1] At the

[1] Thus, almost three years had passed between the return of the indictment and the date on which it was quashed, and four and a half years between the commission of the offenses and the quashing of the indictment. But for the Act of May 10, 1934 (U. S. C., Title 18, Sec. 587) the statute of limitations (U. S. C., Title 18, Sec. 582) would have barred re-indictment.

same term the Government (invoking the Act of May 10, 1934, U. S. C. Title 18, Sec. 587) re-presented the case on March 16, 1937, to the grand jury empaneled for and in session during the January term at Trenton, New Jersey, and the grand jury returned a new indictment on April 9, 1937, at that term which had been extended by order of the Court. The next succeeding term of court for the District of New Jersey was fixed by law to be held beginning April 6, 1937 (the first Tuesday in April), at Newark, New Jersey (U. S. C. Title 28, Sec. 176).

To this new indictment of April 9, 1937, the defendant filed on June 18, 1937, a pleading designated as a "Plea in Bar," alleging (1) that as the offenses charged were committed more than three years preceding the return of the indictment, prosecution was barred by the statute of limitations (U. S. C. Title 18, Sec. 582); (2) that the indictment was not returned in conformity with the Act of May 10, 1934 (U. S. C. Title 18, Sec. 587), because it was returned at the same term and not at the term next succeeding the term at which the prior indictment was found defective; and (3) that the order quashing the prior indictment was appealable under the Criminal Appeals Act (U. S. C. Title 18, Sec. 682) and that, therefore, the Act of May 10, 1934, had no application to that order. The pleading concludes with the following:

> All of which said defendant, Durkee Famous Foods, Inc., is ready and willing to

> verify, and therefore pleads the same in bar of any prosecution or punishment under said indictment or any count thereof, and says that to prosecute or punish it thereunder for any of the alleged offenses charged therein is contrary to the provisions of the statute of limitations, 18 U. S. Code, section 582.
>
> WHEREFORE, the defendant prays judgment that the said alleged indictment be not further prosecuted against it, and that by this court it may be dismissed and discharged from the said premises without day and the said alleged indictment be held for nought and quashed.

On June 28, 1938, the court entered judgment ordering,

> that the said Plea in Bar to said indictment be and the same is hereby sustained, and that said indictment be not further prosecuted against said defendant, and that said indictment be and the same is hereby accordingly dismissed, discharged, held for nought and quashed.

Construing the Act of May 10, 1934, the court's opinion holds that the language of the Act,

> leads to the inescapable conclusion that where an indictment has been found to be defective after the passage of the prescribed period of limitation, the one and only Grand Jury which can hand down a new indictment is that Grand Jury which is authorized to act at the term next succeeding the term at which the Court found the indictment to

be defective; and it appearing, as it does here, that the indictments under review were not found by a Grand Jury authorized as aforesaid, the indictments must necessarily fall.

On the date this judgment was entered the "term next succeeding the term at which the Court found the (prior) indictment to be defective" had expired.

Although the Criminal Appeals Act provides for a direct appeal to the Supreme Court "From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy," the application of that provision to the judgment in this case is not entirely clear, because (1) it is uncertain whether the pleading sustained by the judgment is "a special plea in bar," the prayer thereof being, among other things, that the indictment be "held for nought and quashed," and the judgment being not only that the "Plea in Bar" be sustained but also that the indictment be "dismissed, discharged, held for nought and quashed," and (2) the ruling of the court is not of such nature as forever to bar prosecution of the offenses, but, instead, recognizes the right of the Government to prosecute further at the term of court next succeeding the term at which the Court found the prior indictment to be defective. (Compare *United States* v. *Thompson,* 251 U. S. 407, 412; *United States* v. *Storrs,* 272 U. S. 652.)

The right to appeal, however, is clear, we think under the language of the Act which provides for an appeal "From a decision or judgment quashing setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded."

It is true that the statute here construed (U.S.C. Title 18, Sec. 587) is not the statute which prescribed the substantive offenses charged in the indictment. However, Section 587 must be regarded as being as much a part of the statute (the Elkins Act) prescribing the offenses as if it were expressly written into the latter Act, because, but for this Section, the Government would have had no right whatever to seek the new indictment. Therefore Section 587 would necessarily appear to be a part of the statute upon which the indictment is founded, and it would do no violence to language to so consider it.

If the Elkins Act, which prescribed the offense charged, had contained in its own language a definite statute of limitations but had also directed that the limitation should be suspended under certain circumstances, which is the only effect of Section 587, there clearly could be no question but that a decision or judgment holding that the suspension of the limitation provision did not apply in certain circumstances would be a "decision or jud

ment * * * based upon the * * * construction of the statute upon which the indictment is founded."

E. The question presented is substantial. Section 587 is a statute of general application which was enacted for the purpose of circumventing the efforts of defendants to delay prosecution through resort to dilatory motions until the statute of limitations had barred re-indictment. (Report of Judiciary Committee, Congressional Document 9769, Senate Report 405, 73d Cong., 1st Sess.) The construction of the Act by the District Court interposes an interim of wholly unnecessary and illogical delay in the re-indictment of defendants under this Act, during which interim prosecution would become more difficult through the disappearance or death of witnesses, the vanishing of evidence, and the staleness of the crime, which always result from the passage of time. It is clearly of public importance that after an indictment is quashed the Government be permitted to seek a new indictment at the earliest possible opportunity consistent with the availability of a grand jury. There are no other court decisions on the question here presented, and it is highly important in the enforcement of Federal criminal statutes generally that the question be settled by the Supreme Court.

F. If the judgment of the District Court be regarded as one sustaining a special plea in bar, the

following decisions support the jurisdiction of the Supreme Court:

United States v. *Celestine*, 215 U. S. 278; *United States* v. *Barber*, 219 U. S. 72; *United States* v. *Oppenheimer*, 242 U. S. 85; *United States* v. *Thompson*, 251 U. S. 407.

If the judgment of the District Court quashing and setting aside the indictment was based upon that Court's construction of the statute upon which the indictment was founded, the following decisions sustain the jurisdiction of the Supreme Court:

United States v. *Keitel*, 211 U. S. 370; *United States* v. *Sprague*, 282 U. S. 716; *United States* v. *Hastings*, 296 U. S. 188; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304.

A copy of the opinion of the District Court is appended hereto.

Respectfully submitted.

N. A. TOWNSEND,
Acting Solicitor General.
JOHN J. QUINN,
United States Attorney.

JULY 1938.

In the District Court of the United States for the District of New Jersey

---

CRIMINAL No. 7918b

UNITED STATES OF AMERICA

v.

DURKEE FAMOUS FOODS, INC.

CRIMINAL No. 7919b

UNITED STATES OF AMERICA

v.

MANHATTAN LIGHTERAGE CORPORATION

CRIMINAL No. 7920b

UNITED STATES OF AMERICA

v.

COLGATE-PALMOLIVE-PEET COMPANY

(On defendants' pleas in bar to indictments.)

Newark, N. J., Tuesday, June 14, 1938

Before Hon. GUY L. FAKE, U. S. D. J.

Appearances: Daniel H. Kunkel, Esq., Special Assistant to the United States Attorney, for the Government. Roger Hinds, Esq., for defendant

Durkee Famous Foods, Inc. Frank M. Swacker, Esq., for defendant Manhattan Lighterage Corporation. Messrs. Wall, Haight, Carey & Hartpence, by John A. Hartpence, Esq. and Alfred F. Conway, Esq., for defendant Colgate-Palmolive-Peet Company.

W. W. HEIRONIMUS,
Official Reporter.

The COURT (orally, at close of argument): The issues here arise on three indictments, to each of which pleas in bar have been filed. This memorandum will be dispositive of the three cases.

The defendants were indicted on the 9th of April, 1937, for alleged violations of the Elkins Act, Title 49, Section 41.

The acts complained of in the indictments having been committed, according to the dates set forth therein, more than three years prior to the filing of the indictments, Section 582 of Title 18 of the U. S. Code provides as follows:

> No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in Section 584 of this Title, unless the indictment is found or action is instituted within three years next after such offense shall have been committed.

It is contended for the Government that the pleas should not be sustained because Section 587 of Title 18 of the U. S. Code provides as follows:

> Whenever an indictment is found defective or insufficient for any cause after the

> period prescribed and the applicable Statute of Limitations has expired, a new indictment may be returned at any time during the next succeeding term of Court following such finding, during which the Grand Jury thereof shall be in session.

It is urged that a reasonable and proper consideration of this section causes it to become effective as to the then existing term of Court, notwithstanding the fact that the statute itself is silent as to the then existing term. (Citing Endlich on Interpretation of Statutes, pages 559, etc., *U. S.* v. *N. Y. Central Railroad,* 212 U. S. 509; *U. S.* v. *Koenig Coal Co.,* 270 U. S. 512; *U. S.* v. *Baltimore Post Co.* 2 Fed. (2d) 761, affirmed 268 U. S. 388; *Ozawa* v. *U. S.,* 260 U. S. 178.)

Counsel for the defendants argue that to so construe the statute would cause the Court to enter the sphere of the legislature and in effect amend the Act to read as follows:

> A new indictment may be returned at any time during the next succeeding term of court, following such finding, during which the Grand Jury thereof shall be in session and *as well at the Term in which the indictment is found defective.*

Moreover, it is urged that Section 587 must be strictly construed because it is an exception to the Statute of Limitations.

Other arguments are offered by counsel for the defense, which appear in defendants' briefs. They

cite the following cases to sustain their position: *U. S.* v. *Shelton,* 2 Wheaton, 119–121 and 122. *U. S.* v. *McElvaine,* 272 U. S. 633 at 639; *U. S.* v. *Scherton,* 285 U. S. 518 at 521–2; 16 Corpus Juris, 228, Section 350.

The indictments were returned by a Grand Jury sitting for the January Term of Court on April 9, 1937, but within the time fixed by law for the April Term of Court at Newark, the January Term having been extended by an order of the Court.

At the time the previous indictments were quashed by this Court, the three-year Statute of Limitations had then run against the alleged offenses.

Newark, N. J., Monday, June 27, 1938

(Hearing continued from June 14, 1938. Same appearances.)

The COURT (Orally, at close of argument): At the last session, I stated the facts and raised the issues upon which counsel have appeared before me today. Both sides have been diligent in their endeavors to assist the Court in ascertaining the law to be followed here. No cases have been discovered bearing upon a construction of the section of the Statute of Limitations which is here involved. This has resulted in much research in an endeavor to find an analogous situation, and upon careful consideration of the arguments presented by counsel, as well as a consideration of the cases they have cited, it is my conclusion that the Court, being without power to

amend the statute involved, and it appearing that the statute itself contains no ambiguity, either patent or latent, must give to the statute the generally accepted meaning of the language used therein. This leads to the inescapable conclusion that where an indictment has been found to be defective after the passage of the prescribed period of limitation, the one and only Grand Jury which can hand down a new indictment is that Grand Jury which is authorized to act at the term next succeeding the term at which the Court found the indictment to be defective; and it appearing, as it does here, that the indictments under review were not found by a Grand Jury authorized as aforesaid, the indictments must necessarily fall.

The pleas in bar are therefore sustained.

United States District Court, District of New Jersey. *United States of America, Plaintiff,* v. *Durkee Famous Foods, Inc., a corporation, Defendant.* Criminal No. 7918b. Statement as to jurisdiction. John J. Quinn, United States Attorney. Filed July 25, 1938. At 11 o'clock A. M. Benjamin F. Harvey, Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1939

FILE COPY

DEC 22 1938

No. 369

In the Supreme Court of the United States

October Term, 1938

THE UNITED STATES OF AMERICA, APPELLANT

v.

DURKEE FAMOUS FOODS, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 309

THE UNITED STATES OF AMERICA, APPELLANT

v.

DURKEE FAMOUS FOODS, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 14) has not been reported.

JURISDICTION

The order of the District Court sustaining the plea in bar and dismissing, discharging, and quashing the indictment was entered June 28, 1938 (R. 16). The appeal to this Court was applied for and allowed on July 25, 1938. (R. 19.) The jurisdiction of this Court is conferred by the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246

(U. S. C., Title 18, Sec. 682), and by Section 2 of the Judicial Code as amended by the Act February 13, 1925 (U. S. C., Title 28, Sec. 34 An order was entered by this Court on October 1938, noting probable jurisdiction.

QUESTIONS PRESENTED

1. Whether Section 1 of the Act of May 10, 19 which limits the operation of statutes of limitati and authorizes a new indictment where a prior dictment has been found defective or insuffici for any cause after the period of limitation p vided by the applicable statute has expired, p mits the new indictment to be returned at the sa term of court during which the prior indictmen found defective.

2. Whether the application of the Act, in auth izing new indictments whenever prior indictme are found defective or insufficient "for any caus is conditioned upon or affected by the nature the ground upon which the prior indictment quashed.

STATUTES INVOLVED

The Act of May 10, 1934, c. 278, 48 Stat. (U. S. C., Title 18, Sec. 587); the Act of Novem 17, 1921, c. 124, Sec. 1, 42 Stat. 220 (U. S. C., T 18, Sec. 582) prescribing a three-year statute limitations for offenses not capital; and the pe nent provisions of the Criminal Appeals Act 2564, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682) printed in the Appendix, *infra,* pp. 28–30.

STATEMENT

On April 9, 1937, the grand jury empaneled for and in session during the January 1937 term of the United States District Court for the District of New Jersey indicted the appellee in five counts charging violations of the Elkins Act (U. S. C., Title 49, Sec. 41 (1)). Each count of the indictment (R. 1) alleges that under the following circumstances the appellee, on August 17, 1932, unlawfully and knowingly solicited, accepted and received a concession of 2 cents per 100 pounds in respect of the interstate transportation by certain railroad common carriers of a shipment of palm oil, whereby the oil was transported by the railroads at a less rate and charge than that named in their published schedules and tariffs.

The railroads published in their tariffs a line-haul rate of 40 cents per 100 pounds for the transportation of vegetable oils, including palm oil, from alongside steamships or vessels within the free lighterage or floatage limits of New York Harbor, N. Y., to Chicago, Illinois. Their tariffs provided, in connection with the acceptance and handling of shipments to be transported at that rate, that property loaded in tank cars would receive free floatage within the Harbor when loaded in lots of six or more tank cars, or in less than six cars, if the total weight of the entire shipment was 240,000 pounds or more. The tariffs also provided that shipments of palm oil in lots of 240,000 pounds or

more would be handled across the Harbor in tank barges in lieu of tank cars on floats when the barges were ordered by the shipper or consignee, "in writing," and were available, and that when tank barges were so used, the service of pumping and transferring the oil from the barges to tank cars would be at the expense of the shipper, for which service a charge of 2 cents per 100 pounds would be made against the shipper in addition to the 40-cent line-haul rate (R. 1–2).

Appellee ordered, "in writing," from Lehigh Valley Railroad Company, tank barges, in lieu of tank cars on floats, for the transfer of the specified shipments of imported palm oil from alongside the *"S. S. Georgic,"* at Pier 60, North River, New York [and within the free lighterage and floatage limits of the Harbor] to the Claremont Terminal of the Lehigh Valley Railroad Company in New Jersey, and tendered the shipments to the Railroad Company for transportation from Pier 60 to Chicago, Illinois. The Railroad Company accepted the shipments and, through its agent, Manhattan Lighterage Corporation (appellee in No. 310), conveyed the shipments by tank barge from Pier 60 to Claremont Terminal, where the Lighterage Corporation pumped or transferred the oil from the barges to tank cars, and whence the Railroad Company and connecting railroads transported the shipments to Chicago, Illinois (R. 2–3). Appellee paid to the railroads *only* the line-haul rate of 40

cents per hundred pounds (R. 3). The Lighterage Corporation paid the Railroad Company the 2-cent pumping charge. Pursuant to a previous secret arrangement between the appellee and the Lighterage Corporation the appellee never paid any part of the tariff charge for the pumping service to the railroads or to the Lighterage Corporation, and, by that device, obtained the alleged concession of 2 cents per 100 pounds from the published tariff rate (R. 3).

A prior indictment based upon these facts and charging the same offenses had been returned at the April term of court in 1934 (R. 21). A motion to quash that indictment (R. 29) was sustained by opinion filed January 14, 1937 (R. 31–33), and judgment entered February 2, 1937 (R. 11), during the January 1937 term of court,[1] on the ground that the indictment failed to allege the fact that appellee's request upon the railroad for tank barges was made "in writing" as required by the tariff rule (R. 31), which had been laid before the court by stipulation (R. 30).

At the same term of court the Government, invoking the Act of May 10, 1934, re-presented the case to the grand jury empaneled for and in ses-

[1] Thus, almost three years had passed between the return of the indictment and the date on which it was quashed. Meantime, the offenses having been committed in August 1932, the statutory period of limitation had expired in August 1935, and reindictment was barred but for the Act of May 10, 1934.

sion during the January term, 1937, at Trenton, and the grand jury returned the new indictment on April 9, 1937, the January 1937 term having been extended by order of the court (R. 17). The new indictment in five counts contains the allegation that appellee's order for tank barges was made "in writing," thus curing the defect which the court found in the prior indictment (R. 2).

To this new indictment of April 9, 1937, the defendant filed on June 18, 1937, a pleading designated as a "Plea in Bar," alleging (1) that as the offenses charged were committed more than three years preceding the return of the new indictment, prosecution was barred by the statute of limitations (U. S. C., Title 18, Sec. 582); (2) that the indictment was not returned in conformity with the Act of May 10, 1934, because it was returned at the same term and not at the term next succeeding the term at which the prior indictment was found defective; and (3) that the order quashing the prior indictment was appealable under the Criminal Appeals Act and that, therefore, the Act of May 10, 1934, had no application to that order (R. 10).

On June 28, 1938, the court entered judgment (R. 16) ordering—

> that the said Plea in Bar to said indictment herein be and the same is hereby sustained, and that said indictment be not further prosecuted against said defendant, and that said indictment be and the same is hereby accordingly dismissed, discharged, held for nought and quashed.

Construing the Act the court's opinion (R. 14–16) held that its language—

> leads to the inescapable conclusion that where an indictment has been found to be defective after the passage of the prescribed period of limitation, the one and only Grand Jury which can hand down a new indictment is that Grand Jury which is authorized to act at the term next succeeding the term at which the Court found the indictment to be defective; and it appearing, as it does here, that the indictments under review were not found by a Grand Jury authorized as aforesaid, the indictments must necessarily fall.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In sustaining the plea in bar.

2. In holding and adjudging that the statute of limitations had barred prosecution of the offenses alleged in the several counts of the indictment.

3. In holding and adjudging that the Act of May 10, 1934 (U. S. C., Title 18, Sec. 587), did not limit the application of the statute of limitations (U. S. C., Title 18, Sec. 582) so as to permit the new indictment to be returned by the grand jury empaneled at and in session during the same term of court at which the prior indictment was found defective and insufficient.

4. In holding and adjudging that the Act of May 10, 1934 (U. S. C., Title 18, Sec. 587), was effective to stay the statute of limitations only where the new

indictment is returned by a grand jury in session during the next succeeding term of court following the term at which the prior indictment was found defective or insufficient.

5. In entering the order of June 28, 1938, sustaining the plea in bar and dismissing and quashing the indictment.

SUMMARY OF ARGUMENT

I. The Act of May 10, 1934, prevents the bar of the statute of limitations from becoming effective under the described circumstances until the end of the term of court next succeeding the term during which the prior indictment is quashed. The time thus added to the three-year period of limitations is continuous. The District Court erred in holding that Section 1 of the Act does not permit reindictment at the same term during which the prior indictment was found defective, and that, therefore, the statute of limitations barred reindictment in this case. The decision (1) is contrary to the purpose of the Act and is not required by the language of Section 1; (2) is contrary to the policy and frustrates the essential object of statutes of limitations "to encourage promptitude in the prosecution of remedies", *Riddlesbarger* v. *Hartford Insurance Co.*, 7 Wall 386, 390; (3) creates unnecessary inconsistency between the two sections of the Act, and results in an illogical and unreasonable break within the period of limitation, which is without parallel in previous Acts of Congress.

II. The new indictment was within the authority conferred by the Act to reindict whenever an indictment is found defective or insufficient "for any cause." As the authority to reindict is unconditional, its exercise clearly is not restricted to cases in which no appeal is allowed by the Criminal Appeals Act.

ARGUMENT

I

The District Court Erred in Holding That Section 1 of the Act Does Not Permit Reindictment at the Same Term of Court During Which the Prior Indictment Was Found Defective

The Act of May 10, 1934, was enacted to circumvent the efforts of defendants in criminal cases to delay prosecution, by dilatory motions and collateral proceedings, until, in the event of favorable judgments, the statutes of limitations will have barred reindictment. The Act is entitled "An Act To limit the operation of statutes of limitations in certain cases." It undertakes to extend or enlarge the period of time prescribed by the applicable statutes of limitations in cases wherein either of these situations arises: (a) when an indictment is found defective *after* the applicable period of limitation has expired, and (b) when an indictment is found defective before the applicable period of limitation has expired but it would expire before the end of the next regular term of court.

The purpose was "to prevent the escape of those who had been seasonably indicted, but whose indictment was bad because of some corrigible mistake." L. Hand, J., in *United States* v. *Strewl*, 99 F. (2d) 474, 477 (C. C. A. 2d).

Although enacted as a separate statute, the Act operates as an amendment or proviso to the statute which prescribes the period of limitation for prosecution of the offense in a particular case. It does not create a period of limitation separate or apart from applicable statutes of limitations for it operates only in conjunction with those statutes. The Act, therefore, attaches to the existing statute as its effect expires, and "tacks" on the additional time which is allowed for reindictment, thus preventing the bar of the existing statute from falling upon the offense and avoiding a break in the continuity of the period within which the offense may be prosecuted.

As the statute of limitations (U. S. Code, Title 18, Sec. 582) which is applicable to the indictment in this case had expired before the prior indictment was quashed, the new indictment, the validity of which is the issue here, was returned under the circumstances described by Section 1 of the Act. That section authorizes, when an indictment is quashed after expiration of the applicable period, the return of a new indictment "at any time during the next succeeding term of court following such finding, during which a grand jury thereof shall be in session."

Section 2 provides that, when an indictment is quashed before expiration of the applicable period and such period will run before the end of the next regular term of court, a new indictment may be returned "not later than the end of the next succeeding term of such court, regular or special, following the term at which such indictment was found defective or insufficient, during which a grand jury thereof shall be in session."

Section 3 expressly provides that the defense of the statute of limitations shall not prevail against new indictments returned under the Act, and Section 4 declares that the provisions of the Act shall not apply to any indictment against which the statute of limitations has run at the date upon which the Act was passed.

Although neither section mentions the moment which marks the beginning of the additional time which the Act allows for reindictment, it will be noted that while Section 1 provides that a new indictment may be returned at any time "during the next succeeding term of court * * * during which a grand jury thereof shall be in session", Section 2 provides that a new indictment may be returned "not later than the end of the next succeeding term of such court, * * * during which a grand jury thereof shall be in session." Certainly, both sections fix the same time for expiration of the period intended for reindictment.

The Government contends that the purpose and intent of the Act as a whole is to prevent the bar

of the applicable statute of limitations from falling upon the offense when either of the described situations arises and thus, to extend, without break in continuity, the period provided by the applicable statute, from the moment the circumstances described in either of the two sections arise to the end of the next succeeding term of court.

The court below, conceiving itself bound by the literal meaning of the words "during the next succeeding term of court," held that the only grand jury which is authorized to return a new indictment under Section 1, is the grand jury empaneled for the term next succeeding the term at which the prior indictment was quashed, and that the new indictment in this case was unauthorized because it was returned by the grand jury empaneled for the same term of court at which the prior indictment was quashed instead of the next succeeding term. The decision necessarily holds that Section 1 of the Act fails "to limit" the operation of statutes of limitations during the remainder of the term at which the prior indictment is quashed, but instead allows the bar of the statutes to fall at the moment the prior indictment is quashed, thus clothing the offense with repose and immunity from prosecution from that moment to the beginning of the next succeeding term of court when the offense is "revived" for prosecution.

1. THE DECISION BELOW IS CONTRARY TO THE PURPOSE OF THE ACT AS A WHOLE AND IS NOT REQUIRED BY THE LANGUAGE OF SECTION 1

The sole purpose of the Act is to allow a reasonable additional time for reindictment following the quashing of a prior indictment in either of the described situations. The logical manner of accomplishing this purpose is by superseding the statute of limitations and preventing its bar from "operating" or becoming effective, as otherwise it would, concurrently with the quashing of the prior indictment. And, that this is what Congress intended is indicated by the declaration in the title, that the Act is "to limit the operation" of the applicable statute. Certainly, it is *not* the purpose of the Act to permit the bar of the statute of limitations to become effective; and nothing expressed in its language or to be implied from its purpose to provide additional time, could possibly justify the conclusion that Congress intended that the bar of the statute should become effective upon the quashing of the prior indictment and prevent reindictment until the next term. If, as the lower court holds, Section 1 of the Act does not expressly state that a new indictment may be returned at the same term during which the prior indictment was quashed, then, neither does it expressly declare that a new indictment shall *not* be returned at that same term, nor

does it expressly state that the statute of limitations shall operate, as the decision below necessarily holds, to bar reindictment during the part of that term which remains after the prior indictment is quashed.

The language of Section 2 makes it clear that the additional time for reindictment is intended to begin the moment the prior indictment is quashed, and that the bar of the applicable statute shall not become effective from that moment to the end of the next term. While that section does not specify the moment when the additional time begins, its use of the expression "not later than" the end of the next succeeding term clearly shows that the additional time for reindictment shall be continuous from the expiration of the applicable period to the end of the next term, thus negativing the possibility of the bar of the statute becoming effective until after the end of the next term.

There is no apparent reason for any difference in the manner in which the periods of additional time provided by the two sections should be applied, and the court below suggested none. The legislative history of the Act fails to disclose any intended difference in the application of the additional period authorized by the two sections. On the contrary, it shows beyond question that the application and operation of the additional time should be the same under both sections. The report

f the Senate Judiciary Committee[2] shows that the ame additional period of time for a new indict- ent was intended regardless of whether the prior ndictment is found defective "after the period rescribed by the statute of limitations has run, *or* here said period of limitations has not run but ill expire before the end of the next regular ses- on of the court, * * *"

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[2] JUDICIARY COMMITTEE REPORT—S. 405, February 28, 34 (Calendar, March 5, 1934).

Mr. King, from the Committee on the Judiciary, submit- d the following:

REPORT

To accompany S. 2460

The Committee on the Judiciary, having had under con- deration the bill (S. 2460) to limit the operation of statutes limitations in certain cases, reports the same favorably to e Senate and recommends that the bill do pass, with the llowing amendment:

On page 1, lines 7 and 8, strike out the words "the expira- on of said period of limitations", and insert in lieu thereof e words "such finding".

The purpose of this legislation is set out in the following tter from the Attorney General to the chairman of this mmittee.

JANUARY 17, 1934.

on. HENRY F. ASHURST,

Chairman Committee on the Judiciary,

United States Senate,

Washington, D. C.

MY DEAR SENATOR: In some criminal cases the offense is t discovered until the statute of limitations has nearly n. In other cases defendants are not apprehended for me time or removal proceedings are instituted and appeals ken from habeas corpus orders refusing to release the de- ndant on removal order, and in still other cases dilatory

The opinion below shows that the court gave th words of Section 1 their most narrow and liter meaning and that no consideration was given th intent of Congress, the purpose of the Act as whole, or the language of Section 2.

The court was not bound to adopt a strict co struction or to accept the literal meaning of th words of Section 1. Statutes of limitations havin to do with statutory crimes are "to be liberally in terpreted in favor of repose, * * *" *United States* v. *Scharton,* 285 U. S. 518, 521–522. Th decision does not favor repose, or the purpose such statutes to encourage promptitude of actio Instead, it merely creates an "eclipse," for it re ognizes, as the section provides, that during t next succeeding term of court a valid indictme can be returned.

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motions are made with the hope that, if ultimately sustain the statute of limitations will meanwhile have run agai another prosecution. To safeguard the interests of the G ernment in such cases, legislation is recommended providi that in any case in which an indictment is found defect or insufficient for any cause, after the period prescribed the statute of limitations has run, or where said period limitations has not run but will expire before the end of next regular session of the court, a new indictment may returned at any time during the first succeeding term of co at which a grand jury is in session. The judicial confere favors legislation of this tenor.

A draft of bill to effectuate this recommendation is closed herewith and I shall appreciate it if you will int duce it and lend it your support.

Respectfully,

HOMER CUMMINGS,
Attorney Genera

The Government submits that the court below erred in refusing to apply the rule stated by this Court in *Ozawa* v. *United States,* 260 U. S. 178, 194, as follows:

> It is the duty of this court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result plainly at variance to the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail. See *Holy Trinity Church* v. *United States,* 143 U. S. 457; *Heydenfeldt* v. *Daney Gold Mining Co.,* 93 U. S. 634, 638.

See also *United States* v. *Bowman,* 260 U. S. 94, 102; and *Barrett* v. *Van Pelt,* 268 U. S. 85, 90–91.

2. THE DECISION OF THE COURT BELOW IS CONTRARY TO THE POLICY AND FRUSTRATES THE ESSENTIAL OBJECT OF STATUTES OF LIMITATIONS

Statutes of limitations are legislative acts prescribing definite periods of time within which prosecutions or actions must be brought. Such designation of a specified period of time puts the offender on notice that he may be called to account at any time during that period and at the same time assures him that when this period has ended he

shall be immune to prosecution or legal acti
Such statutes "stimulate to activity and pun
negligence." *Wood* v. *Carpenter,* 101 U. S. 1
139. "The policy of these statutes is to encour
promptitude in the prosecution of remedie
Riddlesbarger v. *Hartford Insurance Company*
Wall. 386, 390. This Court said in *Weber* v. *H*
bor Commissioners, 18 Wall. 57, at p. 70:

> Statutes of limitation, as observed in
> recent case in this court, [*Riddlesbarger*
> *Hartford Insurance Company,* 7 Wall. 39
> "are founded upon the general experience
> mankind, that claims which are valid are
> usually allowed to remain neglected. T
> lapse of years without any attempt to
> force a demand, creates, therefore, a p
> sumption against its original validity,
> that it has ceased to subsist. This presu
> tion is made by these statutes a positive b
> and they thus become statutes of repo
> protecting parties from the prosecution
> stale claims, when by loss of evidence fr
> the death of some witnesses and the imp
> fect recollection of others, or the destruct
> of documents, it might be impossible to
> tablish the truth."

The designated period of time begins, of cou
when the offense is committed or the right of
tion accrues, and the only effect of the statut
"to restrict the period within which the ri
otherwise unlimited, might be asserted." *Ridd*
barger v. *Hartford Insurance Company, su*

The period thus fixed, unless expressly declared otherwise, is continuous, for these statutes "proceed upon the principle that the courts of the country where the person to be prosecuted resides, or the property to be reached is situated, are open during the prescribed period to the suitor." *Brown* v. *Hiatts*, 15 Wall. 177, 184.

The decision below, in importing into the Act without express provision therefor an interim during which prosecution is paralyzed, forces delay in the very face of the fundamental policy and object of statutes of limitations to encourage promptitude and punish delay. As no conceivable purpose is served by interposing this interim of futility, the decision below assumes that Congress intended "a vain and senseless thing"—an assumption which this Court has said it was "not at liberty" to indulge. *Clark* v. *Barnard*, 108 U. S. 436, 460, 461. *Sandberg* v. *McDonald*, 248 U. S. 185, 196. The decision, further, contravenes the fundamental policy of such statutes by so construing this Act as to revive the offense after having reduced it to a state of repose and clothed it with immunity during the interim between the quashing of the prior indictment and the beginning of the next term of court.

It was the duty of the District Court, under the decisions of this Court, to construe the language of Section 1 so as to effectuate the purpose of the Act as a whole and the policy and object of the statutes of limitations of which it is a part, and to harmo-

nize the language of that section with this objec
and with the provisions of Section 2 as well.

In *United States* v. *Katz,* 271 U. S. 354, th
Court repeated the rule that (p. 357):

> All laws are to be given a sensible con
> struction; and a literal application of a stat
> ute, which would lead to absurd conse
> quences, should be avoided whenever a rea
> sonable application can be given to i
> consistent with the legislative purpose.

The decisions of this Court require that the A
be construed as including within the addition
time which it allows for reindictment the r
mainder of the term at which the prior indictme
was quashed, if, as demonstrated above, it appea
that this was the intention of Congress. In *Bo
rett* v. *Van Pelt,* 268 U. S. 85, at p. 90, this Cou
held that "The intention of the law-maker cons
tutes the law" and applied the rule that "A thi
which is within the intention of the makers of
statute is as much within the statute as if it we
within the letter, and a thing which is within t
letter of a statute, is not within the statute, u
less it is within the intention of the makers."
United States v. *Bowman,* 260 U. S. 94, it was h
that a criminal statute (Sec. 35, Criminal Code,
amended, 40 Stat. 1015) confers jurisdiction in t
Southern District of New York of a conspir
committed on the high seas, or in Brazil, to defra
the United States, despite the lack of express wo

conferring such jurisdiction. The Court said at page 102:

> We can not suppose that when Congress enacted the statute or amended it, it did not have in mind that a wide field for such frauds upon the Government was in private and public vessels of the United States on the high seas and in foreign ports and beyond the land jurisdiction of the United States, and therefore intend to include them in the section.

3. THE DECISION BELOW PRODUCES UNNECESSARY INCONSISTENCY BETWEEN THE TWO SECTIONS OF THE SAME ACT, AND ILLOGICAL AND UNREASONABLE RESULTS WHICH ARE WITHOUT ANALOGY IN THE ACTS OF CONGRESS DEALING WITH STATUTES OF LIMITATIONS

The literal interpretation of Section 1, by the court below, produces a break in the continuity of the period of limitation as enlarged by the Act, permitting the bar of the statute to operate and thus to reduce the offense to a state of repose and immunity during the remainder of the term at which the prior indictment is quashed, after which it revives the offense for prosecution until the end of the next succeeding term. This interpretation of Section 1, as argued above, is plainly inconsistent with Section 2 which, by using the words "not later than the end of the next succeeding term," clearly authorizes the new indictment to be returned at the same term during which the prior indictment

is quashed, maintains the continuity of the period of limitation and does not permit the bar of the statute to take effect until the end of the next succeeding term.

Interruption of, or break in, the continuity of the period for reindictment under Section 1, as construed by the District Court, is wholly illogical and unreasonable. Apart from the strict and literal meaning of the language of Section 1, neither the court nor the appellee suggests any reasons whatever for the delay in prosecution and the frustration of the statutory period resulting from their interpretation.

The break in the continuity of the period of limitation, the interposition of an interim of repose, and the revival of the offense after such interim, have no parallel in the Acts of Congress prescribing periods of limitations. In all such Federal statutes, so far as our search discloses, the prescribed period of limitation is *continuous* from the date the offense is committed to the end of the designated period, and in none of them has Congress sought to interrupt the period and hinder or delay the Government in accomplishing the very thing which the statute requires, namely, prompt prosecution. [See Foster, Federal Practice, Vol. I, 6th ed., p. 1015, *et seq.*] Congress has, of course, recognized that situations arise which render prosecution temporarily impossible, and it has specially provided in some of the statutes that the durati

of such situations shall not be treated as part of the period of limitation. For example, Section 583 (U. S. Code, Title 18) expressly provides that the periods of limitations prescribed in Sections 581 and 582 shall not extend "to any person fleeing from justice." Similarly, this Court held that the statutes of limitations of the States did not run against the rights of actions of parties during the continuance of the Civil War. *Brown* v. *Hiatts,* 15 Wall. 177, 184. But, clearly, such interruptions of the statutory period bear no similarity to the interim of repose which the lower court's decision holds that Congress itself has created within the period as extended by this Act.

In *Hawaii* v. *Mankichi,* 190 U. S. 197, this Court repeated the rule that "the intention of the law-making power will prevail, even against the letter of the statute," and reviewed decisions, quoting from one of them as follows (p. 213):

> So in *Heydenfeldt* v. *Daney Gold & Co.,* 93 U. S. 634, 638, it was said by Mr. Justice Davis: "If a literal interpretation of any part of it (a statute) would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected."

Adherence to this rule instead of the literal meaning of the language of Section 1, of the Act, would have avoided the inconsistency and unreasonable consequences of the decision below, and without violence to the words of that section.

II

THE AUTHORITY CONFERRED BY THE ACT TO REINDICT, IN THE DESCRIBED CIRCUMSTANCES, MAY BE EXERCISED WHENEVER AN INDICTMENT IS FOUND DEFECTIVE OR INSUFFICIENT "FOR ANY CAUSE." ITS EXERCISE IS NOT CONDITIONED UPON OR AFFECTED BY THE NATURE OF THE GROUND UPON WHICH THE PRIOR INDICTMENT IS QUASHED

Appellee asserted in the court below that, apar from its other contentions, the new indictment i this case was not authorized by the Act of May 1 1934, because the "previous indictment was by th court found bad in substance and the allegation thereof not to constitute a crime," that the orde was therefore "appealable" under the Crimina Appeals Act, and that the Act of 1934 "has no ap plication to such an order, but is, and is intende to be, confined to the quashing of indictments fo defects of form and pleadings, which orders are n appealable under 18 U. S. Code, section 682 [Crim inal Appeals Act]" (Paragraph 3, Plea in Ba R. 11).[3]

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[3] Appellee states in its motion in this Court to enlarge t record that it will urge the point before this Court (p. Although we discuss the point, it is open to doubt wheth this Court is required to consider it. The District Cour opinion neither accepts nor rejects this ground of the pl but ignores it and sustains the plea on the sole ground th as the Act did not authorize reindictment at the same te at which the prior indictment was quashed, this indictm was barred by the statute of limitations (R. 14–16). *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 3 330.

As both Sections 1 and 2 of the Act of 1934 declare that a new indictment may be returned "whenever" the prior indictment is found defective or insufficient "for any cause," the Government perceives no basis whatever for this contention. The words "for any cause" so clearly include *every* ground upon which an indictment could be found defective or insufficient, as to preclude the slightest doubt of the application of the Act under the described conditions whenever and for whatever reason any indictment is found defective or insufficient. The contention plainly reads into the words of the Act exceptions which are not and could not be placed there by any possible definition of the words used or by the most tenuous implication from them or from the purpose of the Act.

Also, insofar as the contention asserts that the Act intends reindictment only when prior indictments are quashed for "defects of form," it not only ignores the all inclusive language of the Act of 1934, but also overlooks the provision of U. S. Code, Title 18, Sec. 556, that—

> No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant, * * *

Even if it were assumed that the judgment quashing the prior indictment were appealable under the Criminal Appeals Act, there is nothing in the Act of 1934 which conditions its broad authority to reindict upon the availability to the Government of an appeal under the Criminal Appeals Act.

Likewise, there is nothing in the Criminal Appeals Act which affords any basis for the appellee's view. That statute neither prohibits reindictment nor *requires* an appeal. It merely provides the remedy of appeal from a judgment quashing an indictment on the ground of the invalidity or construction of the statute upon which it is founded, or from a judgment sustaining a special plea in bar when the defendant has not been put in jeopardy. *United States* v. *Hastings*, 296 U. S. 188, 192. It leaves the Government free to determine whether it will appeal or reindict. Certainly, that Act does not stand in the way of reindictment *during* the three year period provided by the statute of limitations. And, in the absence of express provision or clear intent to the contrary, it may not be used to restrict the authorization to reindict under the Act of May 10, 1934.

The objects of the two Acts are entirely different and there is nothing in either of them which encroaches upon or restricts the operation of the other.

Moreover, if, as appellee contends, the Act of May 10, 1934, excludes reindictment in cases which may be appealed to this Court, then, the Act would render the appeal futile insofar as further prosecution of the particular offense is concerned in every case in which this Court might affirm the judgment of the District Court. Reindictment based upon this Court's construction would be no less prohibited after the decision by this Court than, as appellee claims, it would before. Cf. *United States* v. *Hastings, supra,* p. 193.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the District Court sustaining the plea in bar should be reversed.

ROBERT H. JACKSON,
Solicitor General.

THURMAN ARNOLD,
Assistant Attorney General.

ELMER B. COLLINS,
Special Assistant to the Attorney General.

W. MARVIN SMITH,
Attorney.

DANIEL H. KUNKEL,
Attorney, Interstate Commerce Commission.

DECEMBER 1938.

APPENDIX

The Act of May 10, 1934, c. 278, 48 Stat. 772 (U. S. C., Title 18, Sec. 587) reads:

AN ACT To limit the operation of statutes of limitation in certain cases

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever an indictment is found defective or insufficient for any cause, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned at any time during the next succeeding term of court following such finding, during which a grand jury thereof shall be in session.

SEC. 2. Whenever an indictment is found defective or insufficient for any cause, before the period prescribed by the applicable statute of limitations has expired, and such period will expire before the end of the next regular term of the court to which such indictment was returned, a new indictment may be returned not later than the end of the next succeeding term of such court, regular or special, following the term at which such indictment was found defective or insufficient, during which a grand jury thereof shall be in session.

SEC. 3. In the event of reindictment under the provisions of this Act the defense of the statute of limitations shall not prevail against the new indictment, any provision of law to the contrary notwithstanding.

SEC. 4. The provisions of this Act shall not apply to any indictment against which the statute of limitations has run at the date of approval hereof.

Approved, May 10, 1934.

The Act of November 17, 1921, c. 124, Sec. 1, 42 Stat. 220 (U. S. C., Title 18, Sec. 582), prescribing a three-year period of limitation for offenses not capital, provides:

That section 1044 of the Revised Statutes of the United States be amended so as to read as follows:

> "No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section 1046, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed: *Provided, however,* That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, the period of limitation shall be six years. This Act shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but this proviso shall not apply to acts, offenses, or transactions which are already barred by the provisions of existing laws."

The Criminal Appeals Act, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682), insofar as pertinent, provides:

> That a writ of error [now appeal] may be taken by and on behalf of the United States from the district or circuit courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:

From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.

* * * * *

From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

* * * * *

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No. 309.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1938.

THE UNITED STATES OF AMERICA,
Appellant,

v.

DURKEE FAMOUS FOODS, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

BRIEF FOR APPELLEE.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1938

No. 309

THE UNITED STATES OF AMERICA,
Appellant

v.

DURKEE FAMOUS FOODS, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

BRIEF FOR APPELLEE.

Preliminary Statement.

The identical questions involved in this case are also involved in the cases of *U. S.* v. *Manhattan Lighterage Corporation*, No. 310, and *U. S.* v. *Colgate-Palmolive-Peet Company*, No. 311, and this brief, prepared in collaboration by counsel for the appellees in all three cases, is intended to apply to and is submitted in behalf of all the appellees.

Opinion Below.

The opinion of the District Court (R. 14) on the order appealed from has not been reported, but its opinion (R. 31 and 33) on the order quashing the prior indictment involved herein is reported in 17 Federal Supplement at page 846.

Questions Presented.

1. Whether a new indictment returned after the expira tion of the applicable period is saved from the bar of limita tions, under Section 1 of the Act of May 10, 1934, when i is returned at the *same term* of court during which the prio indictment was quashed.

2. Whether, within the meaning of the said savin statute, a prior indictment (charging the acceptance of concession from a tariff) was "found defective or insuf cient" when, though the indictment was sufficient upon it face (assuming the truth of the facts alleged therein) it wa found, upon a motion to quash, that the *fact* as to the tari was, in a vital respect, at variance with the allegation.

Statement.

The three-year period under the statute of limitatio (U. S. C. Title 18, Sec. 582) had already run on April 1937, when the present indictment was filed (R. 1), t alleged offenses having occurred in August 1932, more tha three years prior to said date, i. e. nearly five years pri thereto. Concededly, therefore, this prosecution is barr by limitations unless it can be shown to have been saved the Act of May 10, 1934 (48 Stat. 772, U. S. C. Title Sec. 587).

Appellee deems it necessary to correct the followi inaccuracies and omissions in the Statement in appellan brief:

It is not accurate to say, as in the Statement at pag of appellant's brief, that the prior indictment was bas upon the facts set forth in the present indictment. T prior indictment alleged (contrary to the fact) a tar wherein the ordering of tank barges was *not* a conditi precedent to the applicability of the pumping charge. Ha ing thus alleged a pumping charge without a condit

precedent appellant of course did not allege the occurrence of the condition precedent. Taking as true its allegation as to the fact of the tariff there was no occasion to allege in the prior indictment that appellee had ordered the tank barges.

The facts alleged in the present indictment differ vitally from those alleged in the prior indictment in that (1) the present indictment alleges (truthfully) that in the tariff the shipper's ordering of tank barges was made a condition precedent to the applicability of the pumping charge; and (2) the present indictment alleges correspondingly that "said defendant did order in writing * * * tank barges".

The Statement in appellant's brief at page 5 is incomplete, and hence misleading, in that it fails to state that appellee's motion to quash the prior indictment was filed with the District Judge, with the stipulation as to the facts, on April 3, 1935 (R. 30 and 34) and was orally argued on that date. The delay from April 3, 1935 until January 15, 1937, when the motion was filed by the judge with the clerk, was not the delay of the defendant, but was the act of the District Judge withholding his decision upon the motion to quash.

Appellant's Statement also fails to make it clear that, at the time appellee made and argued its motion to quash the prior indictment, there still remained four months of the original three-year period of limitations within which appellant might have obtained a new indictment, even without the benefit of the saving statute.

Appellant's Statement also fails to make it clear that, even after appellee filed its plea in bar to the new (the present) indictment (June 18, 1937, R. 10), appellant still had plenty of time to obtain an indictment in strict compliance with the saving statute (assuming it applies at all) i. e. at the "next succeeding term of court". The said "next succeeding term" was then sitting, and continued to sit for several months and, if the saving statute applies at all, it would then have been entirely practicable for appellant to

have complied with its plain language, after having ha
attention called by appellee in the plainest possible ma
(i. e. by the plea in bar) to the fact that its new indictm
filed during the January term, was premature.

The foregoing facts, omitted from appellant's S
ment, are of especial materiality in view of the implic
in the foot-note at the bottom of page 5 of appellant's b

Appellant's statement, at page 5, that the quashi
the prior indictment was

> " * * * on the ground that the indictment fail
> allege that appellee's request upon the railroa
> tank barges was made 'in writing' "

is misleading, in that it implies that a request for b
was alleged, and that the defect in the allegation was m
that (though alleging a request) it failed to allege tha
request was "in writing". As a matter of fact, the
indictment did not allege any request *at all,* in writi
otherwise. Nor, as we have pointed out, did it allege
the tariff made said request (in writing or otherwi
condition precedent to the applicability of the pum
charge.

It appears from the indictment (R. 2) that oil is t
ported across New York Harbor either in tank barges
tank cars on floats. If it is a matter of indifference t
shipper which of the two means be employed to get th
across the harbor, there is, under the published tari
pumping charge, even if (for the carrier's own conveni
it happens that tank barges, though not ordered o
quested, are actually employed. The pumping charge
applies only when the shipper insists upon the use of
barges, and they are available and are actually used.

Appellant places undeserved emphasis upon the
tional specification that the shipper's order for tank b
be made "in writing". The emphasis should actual
placed upon the specification that the shipper must
tank barges.

Similarly misleading is the statement at page 6 of appellant's brief that the new indictment alleges

> " • • • that appellee's order for tank barges was made 'in writing' thus curing the defect which the court found in the prior indictment."

Actually, the significant change in the new indictment is that it correctly alleges the *fact* as to the tariff, including the condition precedent. The need (in the new indictment) for the allegation that the shipper did order tank barges arises from the fact that the tariff is now truthfully alleged. The allegation that the order for tank barges was "in writing", though necessary, is relatively unimportant as compared to the other new features of the present indictment.

Summary of Argument.

I. The present indictment is concededly barred by the statute of limitations, unless it can be brought within the language of the saving statute, as to which see *infra*.

II. The provision of the saving statute that

> " • • • a new indictment may be returned at any time during the next succeeding term of court following such finding during which a grand jury thereof shall be in session" (Act of May 10, 1934, c. 278, 48 Stat. 772, U. S. C. Title 18, Section 587),

is unambiguous, and does not permit a new indictment after the expiration of the applicable period of limitation at the same term during which the prior indictment was quashed.

III. Even if the above-quoted provision were ambiguous, which it is not, the use of the contrasting expression

> " • • • *not later than* the end of the next succeeding term of such court • • • "

in the contemporaneously-enacted Section 588 of the same statute conclusively evidences a legislative intent that the word "during" shall mean during, and that the contrasting expression "not later than" shall mean not later than.

IV. While the purpose of Section 588 (applicable where the statute is *about to* expire) is to *extend* the statutory period, the purpose of Section 587 is not to extend the statutory period, but to create (after a gap) a new period, one grand-jury-term in length, since it applies only to cases where the previous period has *already* expired. Hence the gap is not the result of an erroneous construction by the court below (as argued by appellant), but by its express terms is a *sine qua non* of the applicability of Section 587.

V. There is nothing anomalous or unusual in a statutory fixing of both the beginning and the end of a period within which suits may be brought (cf. suits against municipalities; suits to recover taxes illegally exacted, etc., *infra*).

VI. "Defective or insufficient" within the intendment of the statute refers to a defect or insufficiency of *allegations* of facts constituting the alleged crime. But the vice of the prior indictment was not that it failed to *allege* facts which (if true) would constitute a crime, but that its allegation of the essential *fact* as to the tariff was *false*. It was only because the allegation as to the fact of the tariff was found on motion to quash to be *false* (i. e. omitting the condition precedent) that the occasion arose for alleging the occurrence of the condition precedent. The prior indictment, therefore, was not "found defective or insufficient" within the intendment of the statute, but was found on motion to quash to be *false in fact*.

ARGUMENT.

I.

The language of the statute is plain and unambiguous and there is no occasion for construction.

The present indictment is concededly barred unless it can be brought within the language of the saving statute, which permits a new indictment to be returned at any time during the next succeeding term of court. In order to save this indictment the statutory provision must be stretched beyond the plain and unambiguous meaning of its language. The expression "*during* the next succeeding term" cannot be stretched so as to mean "*not later than* the end of the next succeeding term". Speculations as to the legislative intent are academic under such circumstances. The intent must be ascertained from the plain and unambiguous language.

U. S. v. *Standard Brewery Co.*, 251 U. S. 210, 217;
U. S. v. *Missouri Pacific Railroad Co.*, 278 U. S. 269, 277;
Commissioner v. *Gottlieb*, 265 U. S. 310, 313;
Russell Motor Car Co. v. *U. S.*, 261 U. S. 514, 519;
U. S. v. *Goldenberg*, 168 U. S. 95, 103.

Nor may a court, where the language of a statute is unambiguous and plain upon its face, either add words to it or take words from it in order to make it state or conform to a meaning other than its plain and unambiguous meaning. As was said by Judge Fake in the court below (R. 15, 16):

> "It is urged that a reasonable and proper consideration of this section causes it to become effective as to the then existing term of Court, notwithstanding the fact that the statute itself is silent as to the then existing term. (Citing Endlich on Interpretation of Statutes, pages 599, etc. U. S. *v.* N. Y. Central Railroad, 212 U. S. 509. U. S. *v.* Koenig Coal Co., 270 U. S. 512. U. S. *v.* Baltimore Post Co., 2 Fed. (2d) 761, affirmed 268 U. S. 388. Ozawa *v.* U. S., 260 U. S. 178.)

"Counsel for the defendants argue that to so construe the statute would cause the Court to enter the sphere of the legislature and in effect amend the Act to read as follows:

"'A new indictment may be returned at any time during the next succeeding term of court, following such finding, during which the Grand Jury thereof shall be in session *and as well at the Term in which the indictment is found defective.*' (Italics ours).

* * * it is my conclusion that the Court, being without power to amend the statute involved, and it appearing that the statute itself contains no ambiguity, either patent or latent, must give to the statute the generally accepted meaning of the language used therein."

II.

Even if the language were ambiguous, the contemporaneous use in Section 588 of the expression "not later than", when that was the legislative intent, clearly indicates that the contrasting word "during" was intended literally in Section 587.

Whether the language of Sections 587 and 588 is the language of the Attorney-General (as intimated at pages 15 and 16 of appellant's brief) or (as impliedly argued by appellant) is the language of Congress, in either case the draftsman evidences sufficient intelligence to employ the expression "not later than" when such is the intent, and therefore must be deemed, when employing the word "during" instead of "not later than", to have *intended* "during" rather than "not later than".

When the same statute employs contrasting expressions, it is deemed to have intended contrasting meanings, particularly where the words are plain and unambiguous.

People v. *Campbell*, 110 Cal. App. 783, 786;
Commonwealth v. *Woodring*, 289 Pa. 437, 449;
Novicki v. *O'Mara*, 280 Pa. 411, 416;
Ex Parte Dees, 50 Cal. App. 11, 19;
Endlich, Interpretation of Statutes, Secs 382-3;

III.

The "gap" which appellant ascribes to an erroneous construction by the Court below, is actually an express sine qua non of the applicability of the statute.

It is Section 588, rather than Section 587, which contemplates a mere *extension* of the statutory period, as distinguished from a re-creating or reviving of a previously expired statutory period.

But obviously Section 587, by its express language, comes into play only

> "• • • *after* the period prescribed by the applicable statute of limitations has expired"

There is therefore nothing "illogical" or "unreasonable" about the

> "• • • interruption, of, or break in, the continuity of the period for reindictment under Section 1, as construed by the District Court"

as argued at page 22 of appellant's brief.

IV.

There is nothing unusual about a statutory fixing of both the beginning and the end of a period within which suits may be brought.

Appellant apparently sees an insuperable obstacle to a construction which fixes both a beginning and an end to a period within which suits may be brought. While appellant can understand a prohibition of suits *after* a specified date, it finds difficulty in understanding a prohibition of suits *before* a specified date.

There is, however, nothing unusual about such a requirement. One illustration is found in taxpayers' suits to recover back taxes which have been illegally exacted. Not only does the revenue act prohibit the bringing of such suit *after* the expiration of the statutory period (U. S. C. Title 28, Sec. 41 (20), U. S. C. Title 26, Secs. 1672-3) but the act fixes a time *before* which such suits may not be brought (U. S. C. Title 26, Secs. 1672-3).

Another illustration is found in suits against municipalities, under statutes fixing not only the end but also the beginning of the period during which such suits may be brought.

New York City Charter of 1897,
(as revised and amended) Sec. 261.
New York Civil Practice Act Sec. 48.

Still another illustration is found in suits against executors.

In view of the clarity of the statutory language it is not necessary or important to determine *why* Section 587 fixes both the beginning and the end of the permissible statutory period, while Section 588 fixes only the end.

Nor are we concerned with the reason for the distinction. But that such a distinction was in fact made, for some reason which appeared cogent to the Attorney-General and to Congress, is clear. The Attorney-General called to the attention of the Senate Committee on the Judiciary (see pp. 15 and 16 of appellant's brief) the fact that the interests of the government might be prejudiced when an indictment was found defective after or very shortly before the running of the statute of limitations. Accordingly he recommended that *in either case* it be provided that "a new indictment may be returned at any time during the *first succeeding* term of court at which a grand jury is in session." All he asked for in his letter and all that was needed was a right to re-indict at a succeeding term. That was what he sought

but as applied to the case dealt with by Section 588, in which the original indictment had been found defective before the statute had run, express authority to re-indict at a succeeding term might easily be held to be exclusive and to destroy by implication the already existing power to re-indict at the same term at which the finding was made. It would certainly raise the question. Consequently in the Act as passed (and apparently as originally drafted by the Attorney-General) the two situations were provided for in separate sections. In Section 588, directed to the situation in which the statute has not yet run, the existing right to re-indict at the current term was preserved from such possible implication.

In Section 587, however, there was no occasion to avoid any such implication.

V.

The prior indictment was not found "defective or insufficient" within the intendment of the saving statute.

In the footnote to page 24 of appellant's brief appellant fails to state that, though there is no mention of the foregoing point in the opinion of the court below, the point was argued both orally and in the briefs.

The failure of the court below to discuss this point of course does not prevent this Court from considering it, as an additional, or alternative, ground for affirmance.

> *U. S.* v. *Norris* (C. C. A. 8th Circ.), 222 Fed. 14, 20;
> *Chicago Title Co.* v. *Newman* (C. C. A. 7th Circ.), 187 Fed. 573, 577.

The words defective and insufficient are, in ordinary parlance, synonymous. As applied to criminal indictments they connote something *lacking*, an omission of some allega-

tion of fact, or facts, necessary to constitute a crime, or charge an offense.

A perfect illustration of an indictment being "found defective or insufficient" would have been furnished in the very case at bar, if the prior indictment had correctly alleged the *fact* as to the pumping charge tariff (i.e. including the condition precedent to its applicability), and had then failed to alleged facts constituting the occurrence of said condition precedent, i.e. the fact that the shipper had ordered tank barges.

Such an indictment would have been "defective or insufficient" within the intendment of the saving statute.

But in the prior indictment, as it was actually drawn, there was no occasion to allege the *occurrence* of the condition precedent, because, assuming the truth of the allegation as to the fact of the tariff, the tariff contained no condition precedent.

Since the prior indictment falsely alleged the tariff (*without* the condition precedent) and alleged a concession from said tariff, it was, in that respect, "sufficient" upon its face and hence was not either insufficient or defective.

The vice of the prior indictment was that it falsely alleged the fact as to the pumping charge tariff. Having alleged the pumping charge falsely, and assuming the truth of that allegation, the prior indictment was not "insufficient" or "defective" by reason of its omitting an allegation that tank barges had been ordered by the shipper.

The prior indictment, therefore, was not found either "defective" or "insufficient", within the intendment of the saving statute, but was found to be false in fact, with respect to the essential allegation as to the pumping charge tariff.

It is true that the order quashing the prior indictment described it as "insufficient", but said order did not use the term within the intendment of the saving statute, and in any event we submit that this Court should examine for itself the

prior indictment and ascertain whether its vice was insufficiency or *falsity*.

It will be noted that the prior indictment could not have been dismissed upon demurrer, or motion to dismiss, because it was sufficient upon its face.

It could be, and was, quashed only in the course of a proceeding wherein there was a *factual* determination as to the nature and terms of the tariff. That determination might have been made at the conclusion of a jury trial, upon an instructed verdict. Actually, it was made upon a motion to quash, the true fact (fatally contrary to the fact alleged in the indictment) having been evidenced by a stipulation (R. 30), and not having been ascertainable from the face of the indictment itself.

While motions to quash perhaps sometimes serve the functions of demurrers, they are also employed for the purpose of determination of facts which, though not alleged in the indictment, are matters of public record or are otherwise incontrovertible or undisputed. In the instant case the fact was a matter of public record, which could not be seriously disputed, and was evidenced to the district court by means of a stipulation. The court's judgment, nevertheless, was essentially based upon the determination that a vital *fact* was at variance with the fact alleged in the indictment, so that, logically analyzed, the judgment quashing the prior indictment was as truly an adjudication based on fact as though there had been a jury verdict as to such fact.

Furthermore, so far as the particular indictment before this Court is concerned we submit that neither the January nor the April Grand Jury had any power to return it. The power to find a new indictment must be to find a new indictment upon the same facts. Appellant appears to recognize that, for in its brief it states that the new indictment against this defendant is for the same offenses. Whether or not that is so, certainly the present indictment charges new and *different* facts. In the original indictment appellee was charged

with receiving concessions under certain incorrectly stat circumstances. It was charged that appellee did certain ac and that *those acts* amounted to receiving an unlawful r concession. And they would have, if the allegation as t the tariff had been true. But it was not true. Therefor a new indictment was found charging *different* facts as to th railroad rate involved.

It follows that the prior indictment was not "found de fective or insufficient", within the meaning of the savin statute, but was found to have been *false in fact.*

Conclusion.

For the reasons stated it is respectfully submitted that the judgment of the District Court under review sustaining the plea in bar and dismissing the indictment should be affirmed.

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January, 1939.

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Supreme Court of the United States

OCTOBER TERM—1938

No. 309

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

DURKEE FAMOUS FOODS, INC.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION TO ENLARGE RECORD.

ROGER HINDS,
Counsel for Appellee.

Supreme Court of the United States,

OCTOBER TERM—1938.

No. 309.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

DURKEE FAMOUS FOODS, INC.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

MOTION TO ENLARGE RECORD.

Now comes Durkee Famous Foods, Inc., defendant in this cause in the United States District Court for the District of New Jersey, which is now pending in this Court on appeal by the above-named Appellant, and respectfully moves that this Honorable Court make its order to enlarge the record herein in the respects hereinbelow specified, and if necessary to that end to issue its writ of certiorari commanding the said District Court to certify and send to this Court a proper and complete transcript of the records so hereinbelow specified.

The aforesaid additional records are as follows:

1. Memorandum opinion of the United States District Court filed January 14, 1937, supporting the order referred to in the plea in bar and answer herein quashing the previous indictment herein (Criminal No. 6821-b).

2. Correcting memorandum opinion of sa
United States District Court filed January 25, 193
correcting the above mentioned opinion (Crimin
No. 6821-b).

3. Motion, including stipulation annexed theret
to quash said previous indictment, filed on or abo
April 3, 1935 (Criminal No. 6821-b) referred to i
the plea in bar and answer herein.

4. Prior indictment herein in said United Stat
District Court returned and filed at the April 19
term of said District Court (Criminal No. 6821-b
though Appellee is ready to stipulate that only par
graph 4 of Count 1, paragraph 1 of Counts 2 to
inclusive, paragraph 3 of Count 6, and paragraph
of Counts 7 to 15 inclusive of said prior indictme
be included in the printed record in this Court.

The following are the reasons and grounds upon whi
Appellee bases this motion:

1. Without the aforesaid records this Court cannot ful
and intelligently consider and determine one of the pri
cipal contentions relied upon by appellee upon its plea i
bar in the District Court, i. e. whether the prior indictme
was quashed because it was "found defective or insufficient
and, therefore, whether the indictment herein is saved fro
the bar of the three-year statute of limitations (18 U. S
Code Sec. 582) by the saving statute, Title 18 U. S. Co
Sec. 587 (May 10, 1934 c. 278, Sec. 1, 48 Stat. 772) provi
ing as follows:

> "Whenever an indictment (prior indictment)
> found *defective* or *insufficient* for any cause, aft
> the period prescribed by the applicable statute
> limitations has expired, a *new* indictment may b
> returned at any time during the next succeedin
> term of court following such finding, during which
> grand jury thereof shall be in session" (The word
> in parenthesis and italics ours).

In order to determine whether or not the prior indictment was "found defective or insufficient" (within the meaning of said saving statute) and hence whether said saving statute applies, it is necessary to examine and consider the above mentioned records, i. e. the opinion supporting the order quashing said prior indictment, the motion and factual stipulation on which said order was based, and so much of said prior indictment as is material to said inquiry.

Defendant-Appellee urged in said District Court herein upon said plea in bar, and will urge in this Court, that said prior indictment was quashed because it appeared by stipulation on the motion to quash that the tariff (which was alleged to have been rebated) contained a vital condition precedent which the prior indictment failed to allege and, therefore, was in a vital respect different from the tariff as alleged in the indictment, so that the ground for quashing said indictment was not that the indictment was "found defective or insufficient" within the meaning of said saving statute, but rather that the Court found that the allegation of the indictment was not supported by the stipulated facts, so that the quashing and dismissal was upon the factual merits rather than for mere insufficiency or defect in form of pleading.

While the District Court did not expressly accept or reject this contention, but, instead, apparently based its order quashing the new indictment solely on the ground that it was returned at the *same* term of court instead of the term next succeeding the term at which the prior indictment was quashed, nevertheless, the contention involves the construction of the Act of May 10, 1934, on which the new indictment is based and should be considered and decided by this Court.

2. The plea in bar herein contains an allegation as to the aforesaid opinion quashing said prior indictment, and the basis therefor, which allegation is denied in the answer of the United States to said plea in bar, and it is necessary

that this Court examine and consider said opinion or said prior indictment, as well as the said motion, stipulation, and prior indictment itself, in order to determine whether or not, for the reason stated above, said saving statute exonerates the present indictment from the bar of the statute of limitations.

3. The Solicitor General has (in his letter dated October 4, 1938) authorized this Appellee to state to this Court that though he does not agree with the contentions of the Appellee, he has no objection to the granting of this motion to enlarge the record.

4. Appellee's excuse for delay in thus moving to enlarge the record is that the praecipe herein was served during the summer vacation, i. e. on July 25, 1938, and it was not until August 31, 1938 that Appellee mailed its counter-praecipe to the United States Attorney with request for acknowledgment of service. On September 12, 1938, said United States Attorney informed Appellee that the rules did not permit him to acknowledge such service, and Appellee thereafter promptly took up with the Clerk and with the Solicitor General the matter of enlarging the record. In the meantime the transcript of the record had already been filed in this Court and it has been suggested that the proper procedure, under the circumstances, is to move to enlarge the record as aforesaid, and for such writ as may be requisite thereto.

Respectfully submitted,

ROGER HINDS,
Counsel for Appellee.

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TRANSCRIPT OF RECORD

UPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 310

THE UNITED STATES OF AMERICA, APPELLANT

vs.

MANHATTAN LIGHTERAGE CORPORATION

PEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

FILED AUGUST 30, 1938

PREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 310

HE UNITED STATES OF AMERICA, APPELLANT

vs.

MANHATTAN LIGHTERAGE CORPORATION

PEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

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A In United States District Court, District of New Jersey

I, Benjamin F. Havens, Clerk of the District Court of the United States for the District of New Jersey, do hereby certify that the annexed is a true copy of Indictment No. 7919b in U. S. vs. Manhattan Lighterage Corporation, filed April 9, 1937, as the same remains of record, and on file in my office.

In testimony whereof, I have hereto subscribed my name and affixed the seal of said Court, at Trenton, in said District, this 26th day of August, A. D, nineteen hundred and thirty-eight.

[SEAL] BENJAMIN F. HAVEN,
Clerk.

Per AMY D. BOND,
Deputy Clerk.

1 In United States District Court, District of New Jersey

Indictment

Filed April 9, 1937

In the District Court of the United States of America in and for the District of New Jersey, at the January Term thereof, in the year 1937.

The Grand Jurors of the United States of America duly empaneled, sworn, and charged to inquire in and for the body of the said District of New Jersey, upon their oaths present:

COUNT 1

1. That throughout the period extending from January 1, 1932, to and including August 31, 1933, Manhattan Lighterage Corporation, hereinafter called defendant, was and still is a corporation of the State of New York, and was engaged, among other things, in the operation of tank barges in New York Harbor and in the business of transporting by tank barge certain bulk fluid commodities, to wit, palm oil, cocoanut oil, olive oil foots, china wood oil, perilla oil, soya bean oil, fish oil, and molasses, from alongside steamship and other points in said New York Harbor to the railway lines and rail terminals of common carriers by railroad located at points contiguous to New York Harbor.

2. That throughout said period Lehigh Valley Railroad Company and Pere Marquette Railway Company, were and still are
2 corporation common carriers engaged in the transportation of property, in interstate commerce, by railroad, for hire, and over and by means of their respective connecting railway lines, operated a through railway route for the transportation of property including palm oil, in carload lots, from alongside vessels and other points in said New York Harbor to a certain point on the line of

said Pere Marquette Railway Company, to wit, Chicago in the State of Illinois.

3. That throughout said period said common carriers had printed and had published and had filed with the Interstate Commerce Commission schedules and tariffs of rates and charges which named and showed the joint rate and charge of said common carriers for the transportation of palm oil, in carload lots, from said New York Harbor to said Chicago, over said through railway route, to be 40 cents per 100 pounds, said rate being hereinafter referred to as the line haul rate; that said schedules and tariffs providing said line haul rate further provided that said rate applied from points within free lighterage limits of said New York Harbor as provided for and in accordance with certain tariffs and schedules of rules, regulations, and charges governing the acceptance and handling of freight at, and for all deliveries in, said New York Harbor, which said last mentioned tariffs and schedules had been duly printed and had been published and had been filed with the Interstate Commerce Commission, by said Lehigh Valley Railroad Company; that said
3 last mentioned tariffs and schedules provided and defined free lighterage and floatage limits in said New York Harbor and further provided that, when ordered by the shipper or consignee in writing and tank barges were available, such articles therein designated as "not lighterage free," including palm oil, would be handled in lots of 240,000 pounds or more, in tank barges in lieu of tank cars on floats from alongside steamship and other points in said free lighterage and floatage limits in said New York Harbor as defined in said schedules and tariffs, to the rail terminals of said Lehigh Valley Railroad Company, the transfer from barges to tank cars to be at the expense of the shipper or consignee, for which service a charge of 2 cents per 100 pounds, hereinafter referred to as pumping charge, would be made in addition to said line haul rate; that said rate of 40 cents per 100 pounds and said pumping charge of 2 cents per 100 pounds, were the lawful rates and the only lawful rates applicable on the shipment of palm oil hereinafter described.

4. That during said period on, to wit, August 12, 1932, Durkee Famous Foods, Inc., as consignor, tendered to said Lehigh Valley Railroad Company at a certain point in New York Harbor, to wit, Pier 60, North River, in the State of New York, and said point being within said free lighterage and floatage limits of said New York Harbor as defined in said schedules and tariffs, together with other shipments of palm oil weighing in excess of 240,000 pounds, a shipment of palm oil of an aggregate weight of, to wit, 120,880 pounds, that being two carload lots, which said palm oil was part of a larger lot of palm oil theretofore transported to said New
4 York Harbor by a certain vessel, to wit, S. S. "Georgic," with directions to transport said 120,880 pounds of palm oil from said Pier 60 in said New York Harbor over said connecting railway lines, to said Chicago, consigned to said Durkee Famous Foods, Inc.

hat during said period on, to wit, August 5, 1932, said Durkee
s Foods, Inc., did order in writing from said Lehigh Valley
ad Company tank barges in lieu of tank cars on floats for the
ng, from alongside said vessel in said New York Harbor to
l terminal of said Lehigh Valley Railroad Company at Clare-
Terminal in the State of New Jersey, of said lot of palm oil
had been transported as aforesaid to said New York Harbor
l vessel.

hat said Lehigh Valley Railroad Company did thereupon, at
ier 60 accept delivery of said 120,880 pounds of palm oil and,
arges being then and there available, did handle, by and
h its agent, said defendant, acting for and employed by said
Valley Railroad Company, said lot of palm oil by tank barge
aid Pier 60 to said rail terminal at said Claremont Terminal,
said Claremont Terminal said defendant, acting for and on
of said Lehigh Valley Railroad Company, did pump said palm
o certain railway tank cars bearing the initials and numbers
227 and ISTX 285; that thereafter said common carriers did
ort by railroad said shipment, loaded in and upon said railroad
ars as aforesaid, over said connecting railway lines in and
through the District of New Jersey and within the jurisdiction
of this Court, to said Chicago and did collect from said Durkee
Famous Foods, Inc., freight charges in the amount of, to wit,
based only upon the aforesaid line haul rate of 40 cents per
unds and said weight of, to wit, 120,880 pounds.

hat on, to wit, August 17, 1932, said defendant, pursuant to an
ement and agreement theretofore made with said Durkee Fa-
Foods, Inc., and with intent secretly to assume and absorb for
nefit of said Durkee Famous Foods, Inc., said pumping charge
nts per 100 pounds provided in said schedules and tariffs and
able upon said shipment of palm oil, did pay and cause to be
o said Lehigh Valley Railroad, said pumping charge in the sum
wit, $24.18, being at the rate of 2 cents per 100 pounds upon
oresaid weight of, to wit, 120,880 pounds.

hat said Durkee Famous Foods, Inc., did pay for the said trans-
ion, including said pumping of the oil from tank barge to tank
aid sum of $483.54, and only said sum of $483.54, instead of the
aggregate freight charge, applicable under the aforesaid
and schedules, of, to wit, $507.72, based and computed upon
ne haul rate of 40 cents per 100 pounds and said weight of, to
20,880 pounds, plus said pumping charge of 2 cents per 100
s and said weight of, to wit, 120,880 pounds; and said Durkee
us Foods, Inc., did refrain from paying said common carriers or
of them or said defendant or any other person or corporation,
umping charge of 2 cents per 100 pounds applicable upon said
ent of palm oil under and by virtue of said tariffs and
ules.

6 9. That on, to wit, August 17, 1932, Manhattan Lighte
Corporation, defendant aforesaid, in the District of
Jersey and within the jurisdiction of this Court, well knowing
premises aforesaid, unlawfully did knowingly, by means of the de
aforesaid, offer, grant, and give a concession of 2 cents per 100 po
in respect of the transportation of the aforesaid shipment of prop
by said common carriers in interstate commerce whereby said p
erty was transported for said Durkee Famous Foods, Inc., from
New York Harbor to said Chicago at a less rate and charge than
named and provided in the schedules and tariffs of said common
riers published and filed as aforesaid; contrary to the form of
statute in such case made and provided and against the peace
dignity of the United States.

7 COUNT 2

And the Grand Jurors aforesaid, upon their oaths aforesaid,
further present:

1. The facts set forth in paragraphs numbered 1, 2, and 3 of
first count of this indictment, which said facts are hereby refer
to and incorporated in this count as fully as if they were he
repeated.

2. That during said period on, to wit, August 12, 1932, Dur
Famous Foods, Inc., as consignor, tendered to said Lehigh Va
Railroad Company at a certain point in New York Harbor, to
Pier 60, North River in the State of New York, said point be
within said free lighterage and floatage limits of said New Y
Harbor as defined in said schedules and tariffs, together with ot
shipments of palm oil weighing in excess of 240,000 pounds, a sh
ment of palm oil of an aggregate weight of, to wit, 121,000 pou
that being two carload lots, which said palm oil was part of a la
lot of palm oil theretofore transported to said New York Harbor
a certain vessel, to wit, S. S. "Georgic," with directions to trans
said 121,000 pounds of palm oil from said Pier 60 in said New Y
Harbor over said connecting railway lines, to said Chicago, consig
to said Durkee Famous Foods, Inc.

3. That during said period on, to wit, August 5, 1932, said Dur
Famous Foods, Inc., did order in writing from said Lehigh Va
Railroad Company tank barges in lieu of tank cars on flo
8 for the handling, from alongside said vessel in said New Y
Harbor to the rail terminal of said Lehigh Valley Railr
Company at Claremont Terminal in the State of New Jersey, of s
lot of palm oil which had been transported as aforesaid to said N
York Harbor by said vessel.

4. That said Lehigh Valley Railroad Company did thereupon
said Pier 60 accept delivery of said 121,000 pounds of palm oil a
tank barges being then and there available, did handle, by and throu
its agent, said defendant, acting for and employed by said Leh
Valley Railroad Company, said lot of palm oil by tank barge fr

said Pier 60 to said rail terminal at said Claremont Terminal, and at said Claremont Terminal said defendant, acting for and on behalf of said Lehigh Valley Railroad Company, did pump said palm oil into certain railway tank cars bearing the initials and numbers ISTX 267 and ISTX 194; that thereafter said common carriers did transport by railroad said shipment, loaded in and upon said railroad tank cars as aforesaid, over said connecting railway lines in and through the District of New Jersey and within the jurisdiction of this Court, to said Chicago and did collect from said Durkee Famous Foods, Inc., freight charges in the amount of, to wit, $484.00 based only upon the aforesaid line haul rate of 40 cents per 100 pounds and said weight of, to wit, 121,000 pounds.

5. That on, to wit, August 17, 1932, said defendant, pursuant to an arrangement and agreement theretofore made with said Durkee Famous Foods, Inc., and with intent secretly to assume and absorb for the benefit of said Durkee Famous Foods, Inc., said pumping charge of 2 cents per 100 pounds provided in said schedules and tariffs and applicable upon said shipment of palm oil, did pay and cause to be paid to said Lehigh Valley Railroad, said pumping charge in the sum of, to wit, $24.20, being at the rate of 2 cents per 100 pounds upon the aforesaid weight of, to wit, 121,000 pounds.

6. That said Durkee Famous Foods, Inc., did pay for the said transportation, including said pumping of the oil from tank barge to tank cars, said sum of $484.00, and only said sum of $484.00, instead of the lawful aggregate freight charge, applicable under the aforesaid tariffs and schedules, of, to wit, $508.20, based and computed upon said line haul rate of 40 cents per 100 pounds and said weight of, to wit, 121,000 pounds, plus said pumping charge of 2 cents per 100 pounds and said weight of, to wit, 121,000 pounds; and said Durkee Famous Foods, Inc., did refrain from paying said common carriers or either of them or said defendant or any other person or corporation said pumping charge of 2 cents per 100 pounds applicable upon said shipment of palm oil under and by virtue of said tariffs and schedules.

7. That on, to wit, August 17, 1932, Manhattan Lighterage Corporation, defendant aforesaid, in the District of New Jersey and within the jurisdiction of this Court, well knowing the premises aforesaid, unlawfully did knowingly, by means of the device aforesaid, offer, grant and give a concession of 2 cents per 100 pounds in respect of the transportation of the aforesaid shipment of property by said common carriers in interstate commerce whereby said property was transported for said Durkee Famous Foods, Inc., from said New York Harbor to said Chicago at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

11 COUNT 3

And the Grand Jurors aforesaid, upon their oaths aforesaid, further present:

1. The facts set forth in paragraphs numbered 1, 2, and 3 of the first count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were here repeated.

2. That during said period on, to wit, August 12, 1932, Durkee Famous Foods, Inc., tendered to said Lehigh Valley Railroad Company at Pier 60, North River, in the State of New York, such pier being within said free lighterage and floatage limits of said New York Harbor as defined in said schedules and tariffs, together with other shipments of palm oil weighing in excess of 240,000 pounds a shipment of palm oil of an aggregate weight of, to wit, 120,940 pounds, that being two carload lots, which said palm oil was part of a larger lot of palm oil theretofore transported to said New York Harbor by a certain vessel, to wit, S.S. "Georgic," with direction to transport said 120,940 pounds of palm oil from said Pier 60 in said New York Harbor over said connecting railway lines, to said Chicago, consigned to said Durkee Famous Foods, Inc.

3. That during said period on, to wit, August 5, 1932, said Durkee Famous Foods, Inc., did order in writing from said Lehigh Valley Railroad Company tank barges in lieu of tank cars on floats for the handling, from alongside said vessel in said New York Harbor

12 to the rail terminal of said Lehigh Valley Railroad Company at Claremont Terminal in the State of New Jersey, of said lot of palm oil which had been transported as aforesaid to said New York Harbor by said vessel.

4. That said Lehigh Valley Railroad Company did thereupon, at said Pier 60 accept delivery of said 120,940 pounds of palm oil and, tank barges being then and there available, did handle, by and through its agent, said defendant, acting for and employed by said Lehigh Valley Railroad Company, said lot of palm oil by tank barge from said Pier 60 to said rail terminal at said Claremont Terminal, and at said Claremont Terminal said defendant, acting for and on behalf of said Lehigh Valley Railroad Company, did pump said palm oil into certain railway tank cars bearing the initials and numbers ISTX 417 and ISTX 422; that thereafter said common carrier did transport by railroad said shipment, loaded in and upon said railroad tank cars as aforesaid, over said connecting railway lines in and through the District of New Jersey and within the jurisdiction of this Court, to said Chicago and did collect from said Durkee Famous Foods, Inc., freight charges in the amount of, to wit, $483.76 based only upon the aforesaid line haul rate of 40 cents per 100 pounds and said weight of, to wit, 120,940 pounds.

5. That on, to wit, August 17, 1932, said defendant, pursuant to an arrangement and agreement theretofore made with said Durkee

us Foods, Inc., and with intent secretly to assume and absorb
e benefit of said Durkee Famous Foods, Inc., said pumping
charge of 2 cents per 100 pounds provided in said schedules
and tariffs and applicable upon said shipment of palm oil, did
pay and cause to be paid to said Lehigh Valley Railroad, said
ing charge in the sum of, to wit, $24.19, being at the rate of
s per 100 pounds upon the aforesaid weight of, to wit, 120,940
ls.

That said Durkee Famous Foods, Inc., did pay for the said trans-
tion, including said pumping of the oil from tank barge to tank
aid sum of $483.76, and only said sum of $483.76, instead of the
l aggregate freight charge, applicable under the aforesaid tar-
nd schedules, of, to wit, $507.95, based and computed upon said
ail rate of 40 cents per 100 pounds and said weight of, to wit,
0 pounds, plus said pumping charge of 2 cents per 100 pounds
aid weight of, to wit, 120,940 pounds; and said Durkee Famous
s, Inc., did refrain from paying said common carriers or either
em or said defendant or any other person or corporation, said
ing charge of 2 cents per 100 pounds applicable upon said ship-
of palm oil under and by virtue of said tariffs and schedules.

That on, to wit, August 17, 1932, Manhattan Lighterage Corpora-
defendant aforesaid, in the District of New Jersey and within
risdiction of this Court, well knowing the premises aforesaid,
fully did knowingly, by means of the device aforesaid, offer,
and give a concession of 2 cents per 100 pounds in respect of
ansportation of the aforesaid shipment of property by said com-
arriers in interstate commerce whereby said property was trans-
d for said Durkee Famous Foods, Inc., from said New York
Harbor to said Chicago at a less rate and charge than that
named and and provided in the schedules and tariffs of said
common carriers published and filed as aforesaid; contrary to
orm of the statute in such case made and provided and against
eace and dignity of the United States.

COUNT 4

d the Grand Jurors aforesaid, upon their oaths aforesaid, do
er present:

The facts set forth in paragraphs numbered 1, 2, and 3 of the
ount of this indictment, which said facts are hereby referred to
incorporated in this count as fully as if they were herein
ted.

That during said period on, to wit, August 12, 1932, Durkee
us Foods, Inc., tendered to said Lehigh Valley Railroad Com-
at Pier 60, North River, in the State of New York, such point
within said free lighterage and floatage limits of said New
Harbor as defined in said schedules and tariffs, together with
shipments of palm oil weighing in excess of 240,000 pounds,
pment of palm oil of an aggregate weight of, to wit, 120,120

pounds, that being two carload lots, which said palm oil was part of a larger lot of palm oil theretofore transported to said New York Harbor by a certain vessel, to wit, "S. S. Georgic," with direction to transport said 120,120 pounds of palm oil from said Pier 60 in said New York Harbor over said connecting railway lines, to said Chicago consigned to said Durkee Famous Foods, Inc.

3. That during said period on, to wit, August 5, 1932, said Durkee Famous Foods, Inc., did order in writing from said Lehigh Valley Railroad Company tank barges in lieu of tank cars on floats for the handling, from alongside said vessel in said New York Harbor to the rail terminal of said Lehigh Valley Railroad Company at Claremont Terminal in the State of New Jersey, of said lot of palm
16 oil which had been transported as aforesaid to said New York Harbor by said vessel.

4. That said Lehigh Valley Railroad Company did thereupon, at said Pier 60 accept delivery of said 120,120 pounds of palm oil and tank barges being then and there available, did handle, by and through its agent, said defendant, acting for and employed by said Lehigh Valley Railroad Company, said lot of palm oil by tank barges from said Pier 60 to said rail terminal at said Claremont Terminal and at said Claremont Terminal said defendant, acting for and on behalf of said Lehigh Valley Railroad Company, did pump said palm oil into certain railway tank cars bearing the initials and numbers ISTX 43 and ISTX 306; that thereafter said common carriers did transport by railroad said shipment, loaded in and upon said railroad tank cars as aforesaid, over said connecting railway lines in and through the District of New Jersey and within the jurisdiction of this Court, to said Chicago and did collect from said Durkee Famous Foods, Inc., freight charges in the amount of, to wit, $480.48 based only upon the aforesaid line haul rate of 40 cents per 100 pounds and said weight of, to wit. 120,120 pounds.

5. That on, to wit, August 17, 1932, said defendant pursuant to an arrangement and agreement theretofore made with said Durkee Famous Foods, Inc., and with intent secretly to assume and absorb for the benefit of said Durkee Famous Foods, Inc. said pumping charge of 2 cents per 100 pounds provided in said schedules and tariffs and applicable upon said shipment of palm oil, did pay and cause to be paid to said Lehigh Valley Railroad Company, said pumping charge in the sum of, to wit, $24.02, being at the rate of 2 cents per 100 pounds upon the aforesaid weight of, to wit, 120,120
pounds.

17 6. That said Durkee Famous Foods, Inc., did pay for the said transportation, including said pumping of the oil from tank barge to tank cars, said sum of $480.48, and only said sum of $480.48, instead of the lawful aggregate freight charge, applicable under the aforesaid tariffs and schedules, of, to wit, $504.50, based and computed upon said line haul rate of 40 cents per 100 pounds and said weight of, to wit, 120,120 pounds, plus said pumping charge

2 cents per 100 pounds and said weight of, to wit, 120,120 pounds; d said Durkee Famous Foods, Inc., did refrain from paying said mmon carriers or either of them or said defendant or any other rson or corporation said pumping charge of 2 cents per 100 pounds plicable upon said shipment of palm oil under and by virtue of said riffs and schedules.

7. That on, to wit, August 17, 1932, Manhattan Lighterage Corration, defendant aforesaid, in the District of New Jersey and ithin the jurisdiction of this Court, well knowing the premises aforeid, unlawfully did knowingly, by means of the device aforesaid, ler, grant, and give a concession of 2 cents per 100 pounds in reect of the transportation of the aforesaid shipment of property by id common carriers in interstate commerce whereby said property as transported for said Durkee Famous Foods, Inc., from said New ork Harbor to said Chicago at a less rate and charge than that named d provided in the schedules and tariffs of said common carriers ublished and filed as aforesaid, contrary to the form of the statute such case made and provided and against the peace and dignity the United States

COUNT 5

And the Grand Jurors aforesaid, upon their oaths aforesaid, do rther present:

1. The facts set forth in paragraphs numbered 1, 2, and 3 of the st count of this indictment, which said facts are hereby referred and incorporated in this count as fully as if they were herein peated.

2. That during said period on, to wit, August 12, 1932, Durkee mous Foods, Inc., tendered to said Lehigh Valley Railroad Comny at Pier 60, North River, in the State of New York, such point ing within said free lighterage and floatage limits of said New ork Harbor as defined in said schedules and tariffs, together with her shipments of palm oil weighing in excess of 240,000 pounds, a ipment of palm oil of an aggregate weight of, to wit, 101,080 unds, that being two carload lots, which said palm oil was part of larger lot of palm oil theretofore transported to said New York arbor by a certain vessel, to wit, "S. S. Georgic," with directions transport said 101,080 pounds of palm oil from said Pier 60 in id New York Harbor over said connecting railway lines, to said hicago, consigned to said Durkee famous Foods, Inc.

3. That during said period on, to wit, August 5, 1932, said Durkee mous Foods, Inc., did order in writing from said Lehigh Valley ailroad Company tank barges in lieu of tank cars on floats for the ndling, from alongside said vessel in said New York Harbor to the il terminal of said Lehigh Valley Railroad Company at Claremont Terminal in the State of New Jersey, of said lot of palm oil which had been transported as aforesaid to said New York Harbor by said vessel.

4. That said Lehigh Valley Railroad Company did thereupon ... said Pier 60 accept delivery of said 101,080 pounds of palm oil ... tank barges being then and there available, did handle, by and thro... its agent, said defendant, acting for and employed by said Le... Valley Railroad Company, said lot of palm oil by tank barge f... said Pier 60 to said rail terminal at said Claremont Terminal, ... at said Claremont Terminal said defendant, acting for and ... behalf of said Lehigh Valley Railroad Company, did pump ... palm oil into certain railway tank cars bearing the initials ... numbers ISTX 288 and ISTX 320; that thereafter said com... carriers did transport by railroad said shipment, loaded in and ... said railroad tank cars as aforesaid, over said connecting railway l... in and through the District of New Jersey and within the jurisdic... of this Court, to said Chicago and did collect from said Du... Famous Foods, Inc., freight charges in the amount of, to wit, $40... based only upon the aforesaid line haul rate of 40 cents per ... pounds and said weight of, to wit, 101,080 pounds.

5. That on, to wit, August 17, 1932, said defendant, pursuant to ... arrangement and agreement theretofore made with said Du... Famous Foods, Inc., and with intent secretly to assume and ab... for the benefit of said Durkee Famous Foods, Inc., said pump... charge of 2 cents per 100 pounds provided in said schedules ... tariffs and applicable upon said shipment of palm oil, did pay ... cause to be paid to said Lehigh Valley Railroad Company, ... pumping charge in the sum of, to wit, $24.19, being at the rate of ... cents per 100 pounds upon the aforesaid weight of, to wit, 101,... pounds.

21 6. That said Durkee Famous Foods, Inc., did pay for t... said transportation, including said pumping of the oil fr... tank barge to tank cars, said sum of $404.32, and only said sum ... $404.32, instead of the lawful aggregate freight charge, applica... under the aforesaid tariffs and schedules, of, to wit, $424.53, based ... computed upon said line haul rate of 40 cents per 100 pounds and ... weight of, to wit, 101,080 pounds, plus said pumping charge of ... cents per 100 pounds and said weight of, to wit, 101,080 pounds; ... said Durkee Famous Foods, Inc., did refrain from paying said co... mon carriers or either of them or said defendant or any other pe... son or corporation, said pumping charge of 2 cents per 100 pou... applicable upon said shipment of palm oil under and by virtue ... said tariffs and schedules.

7. That on, to wit, August 17, 1932, Manhattan Lighterage Co... poration, defendant aforesaid, in the District of New Jersey a... within the jurisdiction of this Court, well knowing the premi... aforesaid, unlawfully did knowingly, by means of the device afo... said, offer, grant and give a concession of 2 cents per 100 pounds ... respect of the transportation of the aforesaid shipment of prope... by said common carriers in interstate commerce whereby said pro... erty was transported for said Durkee Famous Foods, Inc., from ...

w York Harbor to said Chicago at a less rate and charge than that ned and provided in the schedules and tariffs of said common car- s published and filed as aforesaid; contrary to the form of the tute in such case made and provided and against the peace and nity of the United States.

COUNT 6

And the Grand Jurors aforesaid, upon their oaths aforesaid, do ther present:

1. The facts set forth in paragraph numbered one of the first count this indictment, which said facts are hereby referred to and in- porated in this count as fully as if they were herein repeated.

2. That throughout said period Lehigh Valley Railroad Company d The New York, Chicago & St. Louis Railroad Company were and l are, corporation common carriers engaged in the transportation property, in interstate commerce, by railroad, for hire, and over d by means of their respective connecting railway lines, operated a ough railway route for the transportation of property, including oanut oil in carload lots, from alongside vessels and other points New York Harbor to a certain point on the line of said The New rk, Chicago & St. Louis Railroad Company, to wit, Chicago in the te of Illinois.

3. That throughout said period said common carriers had printed d had published and had filed with the Interstate Commerce Com- ssion schedules and tariffs of rates and charges which named and owed the joint rate and charge of said common carriers for the nsportation of cocoanut oil in carload lots, from said New York rbor to said Chicago, over said through railway route, to be 40 cents per 100 pounds, said rate being hereinafter referred to as the line haul rate; that said schedules and tariffs providing said line haul rate further provided that said rate applied from nts within free lighterage limits of said New York Harbor as pro- ded for and in accordance with certain tariffs and schedules of rules, gulations, and charges governing the acceptance and handling of ight at, and for all deliveries in, said New York Harbor, which d last mentioned tariffs and schedules had been duly printed and d been published and had been filed with the Interstate Commerce mmission by said Lehigh Valley Railroad Company; that said last entioned tariffs and schedules provided and defined free lighterage d floatage limits in said New York Harbor and further provided at, when ordered by the shipper or consignee in writing and tank rges were available, such articles therein designated as "not light- ge free," including cocoanut oil, would be handled in lots of 240,- 0 pounds or more, in tank barges in lieu of tank cars on floats from ngside steamship and other points in said free lighterage and float- e limits in said New York Harbor as defined in said schedules and riffs, to the rail terminals of said Lehigh Valley Railroad Company, e transfer from barges to tank cars to be at the expense of the ship-

per or consignee; for which service a charge of 2 cents per 100 pou
hereinafter referred to as pumping charge, would be made in ad
tion to said line haul rate; that said rate of 40 cents per 100 pou
and said pumping charge of 2 cents per 100 pounds, were the lawf
rates and the only lawful rates applicable on the shipment of coc
nut oil hereinafter described.

24 4. That during said period, on, to wit, April 15, 1933, Durk
Famous Foods, Inc., as consignor, tendered to said Lehigh Va
ley Railroad Company at a certain point in New York Harbor,
wit, 29th Street Pier, Brooklyn, in the State of New York, said po
being within said free lighterage and floatage limits of said New Y
Harbor as defined in said schedules and tariffs, together with ot
shipments of cocoanut oil weighing in excess of 240,000 pounds,
shipment of cocoanut oil of an aggregate weight of, to wit, 58,
pounds, that being a carload lot, which said cocoanut oil was part
a larger lot of cocoanut oil theretofore transported to said New Y
Harbor by a certain vessel, to wit, S. S. "Steel Scientist," with dir
tions to transport said 58,320 pounds of cocoanut oil from said 2
Street Pier in said New York Harbor over said connecting railw
lines, to said Chicago, consigned to said Durkee Famous Foods, In

5. That prior to April 15, 1933, said Durkee Famous Foods, In
did order in writing from said Lehigh Valley Railroad Company ta
barges in lieu of tank cars on floats for the handling, from along
said vessel in said New York Harbor to the rail terminal of s
Lehigh Valley Railroad Company at Claremont Terminal in t
State of New Jersey, of said lot of cocoanut oil which had been tra
ported as aforesaid to said New York Harbor by said vessel.

6. That said Lehigh Valley Railroad Company did thereupon,
said 29th Street Pier, accept delivery of said 58,320 pounds of coc
nut oil and, tank barges being then and there available, did hand
by and through its agent, said defendant, acting for and emplo
by said Lehigh Valley Railroad Company, said lot of cocoanut
by tank barge from said 29th Street Pier to said rail termi

25 at said Claremont Terminal, and at said Claremont Termi
said defendant, acting for and on behalf of said Lehigh Val
Railroad Company, did pump said cocoanut oil into a certain r
way tank car bearing the initials and number SHPX 7609; t
thereafter said common carriers did transport by railroad said sh
ment, loaded in and upon said railroad tank car as aforesaid, o
said connecting railway lines in and through the District of N
Jersey and within the jurisdiction of this Court, to said Chicago
did collect from said Durkee Famous Foods, Inc., freight charges
the amount of, to wit, $233.28 based only upon the aforesaid line h
rate of 40 cents per 100 pounds and said weight of, to wit, 58,
pounds.

7. That on, to wit, April 21, 1933, said defendant, pursuant to an
rangement and agreement theretofore made with said Durkee Fa
mous Foods, Inc., and with intent secretly to assume and absorb
the benefit of said Durkee Famous Foods, Inc., said pumping cha

nts per 100 pounds provided in said schedules and tariffs and
ble upon said shipment of cocoanut oil, did pay and cause to
l to said Lehigh Valley Railroad, said pumping charge in the
, to wit, $11.66, being at the rate of 2 cents per 100 pounds
he aforesaid weight of, to wit, 58,320 pounds.

hat said Durkee Famous Foods, Inc., did pay for the said
ortation, including said pumping of the oil from tank barge
r cars, said sum of $233.28, and only said sum of $233.28, in-
stead of the lawful aggregate freight charge, applicable under
the aforesaid tariffs and schedules, of, to wit, $244.94, based
and computed upon said line haul rate of 40 cents per 100
s and said weight of, to wit, 58,320 pounds, plus said pumping
of 2 cents per 100 pounds and said weight of, to wit, 58,320
s; and said Durkee Famous Foods, Inc., did refrain from pay-
id common carriers or either of them, or said defendant or any
person or corporation, said pumping charge of 2 cents per 100
s applicable upon said shipment of cocoanut oil under and by
of said tariffs and schedules.

hat on, to wit, April 21, 1933, Manhattan Lighterage Corpora-
lefendant aforesaid, in the District of New Jersey and within
risdiction of this Court, well knowing the premises aforesaid,
fully did knowingly, by means of the device aforesaid, offer,
and give a concession of 2 cents per 100 pounds in respect of
ansportation of the aforesaid shipment of property by said
on carriers in interstate commerce whereby said property was
orted for said Durkee Famous Foods, Inc., from said New York
r to said Chicago at a less rate and charge than that named
rovided in the schedules and tariffs of said common carriers
hed and filed as aforesaid; contrary to the form of the statute
h case made and provided and against the peace and dignity
United States.

COUNT 7

l the Grand Jurors aforesaid, upon their oaths aforesaid, do
r present:

The facts set forth in paragraphs numbered 1 of the first count
and 3 of the sixth count of this indictment, which said facts
reby preferred to and incorporated in this count as fully as if
were herein repeated.

That during said period on, to wit, April 15, 1933, Durkee
us Foods, Inc., tendered to said Lehigh Valley Railroad Com-
at 29th Street Pier, Brooklyn, in the State of New York, such
being within said free lighterage and floating limits of said
York Harbor as defined in said schedules and tariffs, together
other shipments of cocoanut oil weighing in excess of 240,000
ds, a shipment of cocoanut oil of an aggregate weight of, to wit,
) pounds, that being a carload lot, which said cocoanut oil was
of a larger lot of cocoanut oil theretofore transported to said

New York Harbor by a certain vessel, to wit, S. S. "Steel Scientist" with directions to transport said 62.640 pounds of cocoanut oil from said 29th Street Pier in said New York Harbor over said connecting railway lines, to said Chicago, consigned to said Durkee Famous Foods, Inc.

3. That prior to April 15, 1933, said Durkee Famous Foods, Inc. did order in writing from said Lehigh Valley Railroad Company tank barges in lieu of tank cars on floats for the handling, from alongside said vessel in said New York Harbor to the rail terminal of said Lehigh Valley Railroad Company at Claremont Terminal in the State of New Jersey, of said lot of cocoanut oil which had been transported as aforesaid to said New York Harbor by said vessel.

28 4. That said Lehigh Valley Railroad Company did thereupon, at said 29th Street Pier accept delivery of said 62,640 pounds of cocoanut oil and, tank barges being then and there available, did handle, by and through its agent, said defendant, acting for and employed by said Lehigh Valley Railroad Company, said lot of cocoanut oil by tank barge from said 29th Street Pier to said rail terminal at said Claremont Terminal, and at said Claremont Terminal said defendant, acting for and on behalf of said Lehigh Valley Railroad Company, did pump said cocoanut oil into a certain railway tank car bearing the initials and number SHPX 8778; that thereafter said common carriers did transport by railroad said shipment, loaded in and upon said railroad tank car as aforesaid, over said connecting railway lines in and through the District of New Jersey and within the jurisdiction of this Court, to said Chicago and did collect from said Durkee Famous Foods, Inc., freight charges in the amount of, to wit, $250.56 based only upon the aforesaid line haul rate of 40 cents per 100 pounds and said weight of, to wit, 62,640 pounds.

5. That on, to wit, April 21, 1933, said defendant, pursuant to an arrangement and agreement theretofore made with said Durkee Famous Foods, Inc., and with intent secretly to assume and absorb for the benefit of said Durkee Famous Foods, Inc., said pumping charge of 2 cents per 100 pounds provided in said schedules and tariffs and applicable upon said shipment of cocoanut oil, did pay and cause to be paid to said Lehigh Valley Railroad Company, said pumping charge in the sum of, to wit, $12.53, being at the rate of 2 cents per 100 pounds upon the aforesaid weight of, to wit, 62,640.

29 6. That said Durkee Famous Foods, Inc., did pay for the said transportation, including said pumping of the oil from tank barge to tank cars, said sum of $250.56, and only said sum of $250.56, instead of the lawful aggregate freight charge, applicable under the aforesaid tariffs and schedules, of, to wit, $263.09, based and computed upon said line haul rate of 40 cents per 100 pounds and said weight of, to wit, 62,640 pounds, plus said pumping charge of 2 cents per 100 pounds and said weight of, to wit, 62,640 pounds; and said Durkee Famous Foods, Inc., did refrain from paying said common carriers or either of them or said defendant or any other

erson or corporation, said pumping charge of 2 cents per 100 pounds pplicable upon said shipment of cocoanut oil under and by virtue of id tariffs and schedules.

7. That on, to wit, April 21, 1933, Manhattan Lighterage Corporation, defendant aforesaid, in the District of New Jersey and within he jurisdiction of this Court, well knowing the premises aforesaid, unlawfully did knowingly, by means of the device aforesaid, offer, grant, and give a concession of 2 cents per 100 pounds in respect o the transportation of the aforesaid shipment of property by said ommon carriers in interstate commerce whereby said property was ransported for said Durkee Famous Foods, Inc., from said New York Harbor to said Chicago at a less rate and charge than that named and provided in the schedules and tariffs of said common arriers published and filed as aforesaid; contrary to the form of the tatute in such case made and provided and against the peace and ignity of the United States.

COUNT 8

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs numbered 1 of the first count nd 2 and 3 of the sixth count of this indictment, which said facts re hereby referred to and incorporated in this count as fully as if hey were herein repeated.

2. That during said period on, to wit, April 15, 1933, Durkee Famous Foods, Inc., tendered to said Lehigh Valley Railroad Company at 29th Street Pier, Brooklyn, in the State of New York, such point being within said free lighterage and floatage limits of said New York Harbor as defined in said schedules and tariffs, together with other shipments of cocoanut oil weighing in excess of 240,000 pounds, a shipment of cocoanut oil of an aggregate weight of, to wit, 62,660 pounds, that being a carload lot, which said cocoanut oil was part of a larger lot of cocoanut oil theretofore transported to said New York Harbor by a certain vessel, to wit, S. S. "Steel Scientist", with directions to transport said 62,660 pounds of cocoanut oil from said 29th Street Pier in said New York Harbor over said connecting railway lines, to said Chicago, consigned to said Durkee Famous Foods, Inc.

3. That prior to April 15, 1933, said Durkee Famous Foods, Inc., did order in writing from said Lehigh Valley Railroad Company tank barges in lieu of tank cars on floats for the handling, from alongside said vessel in said New York Harbor to the rail terminal of said Lehigh Valley Railroad Company at Claremont Terminal in the State of New Jersey, of said lot of cocoanut oil which had been transported as aforesaid to said New York Harbor by said vessel.

31 4. That said Lehigh Valley Railroad Company did then
upon, at said 29th Street Pier accept delivery of said
pounds of cocoanut oil and, tank barges being then and there
able, did handle, by and through its agent, said defendant, acting
and employed by said Lehigh Valley Railroad Company, said
cocoanut oil by tank barge from said 29th Street Pier to said
terminal at said Claremont Terminal, and at said Claremont Ter-
minal said defendant, acting for and on behalf of said Lehigh Valley
Railroad Company, did pump said cocoanut oil into a certain rail-
way tank car bearing the initials and number SHPX 8666; that
thereafter said common carriers did transport by railroad said
shipment loaded in and upon said railroad tank car as aforesaid
over said connecting railway lines in and through the District of
New Jersey and within the jurisdiction of this Court, to said Chi-
cago and did collect from said Durkee Famous Foods, Inc., freight
charges in the amount of, to wit, $250.64 based only upon the afore-
said line haul rate of 40 cents per 100 pounds and said weight of, to
wit, 62,660 pounds.

5. That on, to wit, April 21, 1933, said defendant, pursuant to an
arrangement and agreement theretofore made with said Durkee
Famous Foods, Inc., and with intent secretly to assume and absorb
for the benefit of said Durkee Famous Foods, Inc., said pumping
charge of 2 cents per 100 pounds provided in said schedules and
tariffs and applicable upon said shipment of cocoanut oil, did pay
and cause to be paid to said Lehigh Valley Railroad Company, said
pumping charge in the sum of, to wit, $12.53, being at the rate of
2 cents per 100 pounds upon the aforesaid weight of, to wit, 62,66
pounds.

32 6. That said Durkee Famous Foods, Inc., did pay for the said
transportation, including said pumping of the oil from tank
barge to tank cars, said sum of $250.64, and only said sum of $250.64
instead of the lawful aggregate freight charge, applicable under the
aforesaid tariffs and schedules, of, to wit, $273.17, based and computed
upon said line haul rate of 40 cents per 100 pounds and said weight
of, to wit, 62,660 pounds, plus said pumping charge of 2 cents per
100 pounds and said weight of, to wit, 62,660 pounds; and said
Durkee Famous Foods, Inc., did refrain from paying said common
carriers or either of them or said defendant or any other person
or corporation, said pumping charge of 2 cents per 100 pounds appli-
cable upon said shipment of cocoanut oil under and by virtue of said
tariffs and schedules.

7. That on, to wit, April 21, 1933, Manhattan Lighterage Corpo-
ration, defendant aforesaid, in the District of New Jersey and within
the jurisdiction of this Court, well knowing the premises aforesaid,
unlawfully did knowingly, by means of the device aforesaid, offer,
grant and give a concession of 2 cents per 100 pounds in respect of
the transportation of the aforesaid shipment of property by said
common carriers in interstate commerce whereby said property was

ansported for said Durkee Famous Foods, Inc., from said New ork Harbor to said Chicago at a less rate and charge than that amed and provided in the schedules and tariffs of said common car- ers published and filed as aforesaid; contrary to the form of the atute in such case made and provided and against the peace and nity of the United States.

COUNT 9

And the Grand Jurors aforesaid, upon their oaths aforesaid, do rther present:

1. The facts set forth in paragraph numbered 1 of the first count nd 2 and 3 of the sixth count of this indictment, which said facts re hereby referred to and incorporated in this count as fully as if ey were herein repeated.

2. That during said period on, to wit, April 15, 1933, Durkee amous Foods, Inc., tendered to said Lehigh Valley Railroad Com- any at 29th Street Pier, Brooklyn, in the State of New York, such oint being within said free lighterage and floatage limits of said ew York Harbor as defined in said schedules and tariffs, together ith other shipments of cocoanut oil weighing in excess of 240,000 ounds, a shipment of cocoanut oil of an aggregate weight of, to it, 57,720 pounds, that being a carload lot, which said cocoanut oil as part of a larger lot of cocoanut oil theretofore transported to id New York Harbor by a certain vessel, to wit, S. S. "Steel Scien- st," with directions to transport said 57,720 pounds of cocoanut oil rom said 29th Street Pier in said New York Harbor over said onnecting railway lines, to said Chicago, consigned to said Durkee amous Foods, Inc.

3. That prior to April 15, 1933, said Durkee Famous Foods, Inc., id order in writing from said Lehigh Valley Railroad Company ank barges in lieu of tank cars on floats for the handling, from longside said vessel in said New York Harbor to the rail terminal f said Lehigh Valley Railroad Company at Claremont Terminal n the State of New Jersey, of said lot of cocoanut oil which had een transported as aforesaid to said New York Harbor by said vessel.

4. That said Lehigh Valley Railroad Company did there- upon, at said 29th Street Pier accept delivery of said 57,720 ounds of cocoanut oil and, tank barges being then and there avail- ble, did handle, by and through its agent, said defendant, acting r and employed by said Lehigh Valley Railroad Company, said t of cocoanut oil by tank barge from said 29th Street Pier to said il terminal at said Claremont Terminal, and at said Claremont erminal said defendant, acting for and on behalf of said Lehigh alley Railroad Company, did pump said cocoanut oil into a cer- in railway tank car bearing the initials and number SHPX 7639; at thereafter said common carriers did transport by railroad said ipment, loaded in and upon said railroad tank car as aforesaid,

over said connecting railway lines in and through the District of New Jersey and within the jurisdiction of this Court, to said Chicago and did collect from said Durkee Famous Foods, Inc., freight charges in the amount of, to wit, $230.88 based only upon the aforesaid line haul rate of 40 cents per 100 pounds and said weight of, to wit, 57,720 pounds.

5. That on, to wit, April 21, 1933, said defendant, pursuant to an arrangement and agreement theretofore made with said Durkee Famous Foods, Inc., and with intent secretly to assume and absorb for the benefit of said Durkee Famous Foods, Inc., said pumping charge of 2 cents per 100 pounds provided in said schedules and tariffs and applicable upon said shipment of cocoanut oil, did pay and cause to be paid to said Lehigh Valley Railroad Company, said pumping charge in the sum of, to wit, $11.54, being at the rate of 2 cents per 100 pounds upon the aforesaid weight of, to wit, 57,720 pounds.

35 6. That said Durkee Famous Foods, Inc., did pay for the said transportation, including said pumping of the oil from tank barge to tank cars, said sum of $230.88, and only said sum of $230.88, instead of the lawful aggregate freight charge, applicable under the aforesaid tariffs and schedules, of, to wit, $242.42, based and computed upon said line haul rate of 40 cents per 100 pounds and said weight of, to wit, 57,720 pounds, plus said pumping charge of 2 cents per 100 pounds and said weight of, to wit, 57,720 pounds; and said Durkee Famous Foods, Inc., did refrain from paying said common carriers or either of them or said defendant or any other person or corporation, said pumping charge of 2 cents per 100 pounds applicable upon said shipment of cocoanut oil under and by virtue of said tariffs and schedules.

7. That on, to wit, April 21, 1933, Manhattan Lighterage Corporation, defendant aforesaid, in the District of New Jersey and with the jurisdiction of this Court, well knowing the premises aforesaid, unlawfully did knowingly, by means of the device aforesaid, offer, grant and give a concession of 2 cents per 100 pounds in respect of the transportation of the aforesaid shipment of property by said common carriers in interstate commerce whereby said property was transported for said Durkee Famous Foods, Inc., from said New York Harbor to said Chicago at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

36 COUNT 10

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraph numbered 1 of the first count and 2 and 3 of the sixth count of this indictment, which said facts

are hereby referred to and incorporated in this count as fully as if they were herein repeated.

2. That during said period on, to wit, April 15, 1933, Durkee Famous Foods, Inc., tendered to said Lehigh Valley Railroad Company at 29th Street Pier, Brooklyn, in the State of New York, such point being within said free lighterage and floatage limits of said New York Harbor as defined in said schedules and tariffs, together with other shipments of cocoanut oil weighing in excess of 240,000 pounds, a shipment of cocoanut oil of an aggregate weight of, to wit, 58,160 pounds, that being a carload lot, which said cocoanut oil was a part of a larger lot of cocoanut oil theretofore transported to said New York Harbor by a certain vessel, to wit, S. S. "Steel Scientist," with directions to transport said 58,160 pounds of cocoanut oil from said 29th Street Pier in said New York Harbor over said connecting railway lines, to said Chicago, consigned to said Durkee Famous Foods, Inc.

3. That prior to April 15, 1933, said Durkee Famous Foods, Inc., did order in writing from said Lehigh Valley Railroad Company tank barges in lieu of tank cars on floats for the handling, from alongside said vessel in said New York Harbor to the rail terminal of said Lehigh Valley Railroad Company at Claremont Terminal in the State of New Jersey, of said lot of cocoanut oil which had been transported as aforesaid to said New York Harbor by said vessel.

37 4. That said Lehigh Valley Railroad Company did thereupon at said 29th Street Pier accept delivery of said 58,160 pounds of cocoanut oil and, tank barges being then and there available, did handle, by and through its agent, said defendant, acting for and employed by said Lehigh Valley Railroad Company, said lot of cocoanut oil by tank barge from said 29th Street Pier to said rail terminal at said Claremont Terminal, and at said Claremont Terminal said defendant, acting for and on behalf of said Lehigh Valley Railroad Company, did pump said cocoanut oil into a certain railway tank car bearing the initials and number SHPX 7677; that thereafter said common carriers did transport by railroad said shipment, loaded in and upon said railroad tank car as aforesaid, over said connecting railway lines and through the District of New Jersey and within the jurisdiction of this Court, to said Chicago, and did collect from said Durkee Famous Foods, Inc., freight charges in the amount of, to wit, $232.64 based only upon the aforesaid line haul rate of 40 cents per 100 pounds and said weight of, to wit, 58,160 pounds.

5. That on, to wit, April 21, 1933, said defendant, pursuant to an arrangement and agreement theretofore made with said Durkee Famous Foods, Inc., and with intent secretly to assume and absorb for the benefit of said Durkee Famous Foods, Inc., said pumping charge of 2 cents per 100 pounds provided in said schedules and tariffs and applicable upon said shipment of cocoanut oil, did pay and cause to be paid to said Lehigh Valley Railroad Company said pumping

charge in the sum of, to wit, $11.63, being at the rate of 2 cent
100 pounds upon the aforesaid weight of, to wit, 58,160 po
38 6. That said Durkee Famous Foods, Inc., did pay fo
said transportation, including said pumping of the oil
tank barge to tank cars, said sum of $232.64, and only said su
$232.64, instead of the lawful aggregate freight charge, appli
under the aforesaid tariffs and schedules, of, to wit, $244.27,
and computed upon said line haul rate of 40 cents per 100 po
and said weight of, to wit, 58,160 pounds, plus said pumping ch
of 2 cents per 100 pounds and said weight of, to wit, 58,160 po
and said Durkee Famous Foods, Inc., did refrain from paying
common carriers or either of them or said defendant or any
person or corporation said pumping charge of 2 cents per 100 po
applicable upon said shipment of cocoanut oil under and by virt
said tariffs and schedules.

7. That on, to wit, April 21, 1933, Manhattan Lighterage Cor
tion, defendant aforesaid, in the District of New Jersey and w
the jurisdiction of this Court, well knowing the premises afore
unlawfully did knowingly, by means of the device aforesaid,
grant, and give a concession of 2 cents per 100 pounds in respe
the transportation of the aforesaid shipment of property by
common carriers in interstate commerce whereby said property
transported for said Durkee Famous Foods, Inc., from said
York Harbor to said Chicago at a less rate and charge than
named and provided in the schedules and tariffs of said common
riers published and filed as aforesaid, contrary to the form o
statute in such case made and provided and against the peace
dignity of the United States.

39 COUNT 11

And the Grand Jurors aforesaid, upon their oaths aforesaid
further present:

1. The facts set forth in paragraph numbered one of the first
of this indictment, which said facts are hereby referred to an
corporated in this count as fully as if they were herein repeated.

2. That throughout said period Erie Railroad Company and
Cleveland, Cincinnati, Chicago & St. Louis Railway Company,
and still are, corporation common carriers engaged in the transp
tion of property, in interstate commerce, by railroad, for hire,
over and by means of their respective connecting railway lines
erated a through railway route for the transportation of prop
including palm oil, in carload lots, from alongside vessels and
points in New York Harbor to a certain point on the line of
The Cleveland, Cincinnati, Chicago & St. Louis Railway Compan
wit, Jeffersonville in the State of Indiana.

3. That throughout said period said common carriers had pr
and had published and had filed with the Interstate Commerce
mission schedules and tariffs of rates and charges which named

showed the joint rate and charge of said common carriers for the transportation of palm oil in carload lots, from said New York Harbor to said Jeffersonville, over said through railway route, to be 40 cents per 100 pounds, said rate being hereinafter referred to as the line haul rate; that said schedules and tariffs providing said line haul rate further provided that said rate applied from points within
40 free lighterage limits of said New York Harbor as provided for in accordance with certain tariffs and schedules of rules, regulations, and charges governing the acceptance and handling of freight at, and for all deliveries in, said New York Harbor, which said last mentioned tariffs and schedules had been duly printed and had been published and had been filed with the Interstate Commerce Commission by said Erie Railroad Company; that said last mentioned tariffs and schedules provided and defined free lighterage and floatage limits in said New York Harbor and further provided that, when ordered by the shipper or consignee in writing and tank barges were available, such articles therein designated as "not lighterage free," including palm oil, would be handled in lots of 240,000 pounds or more, in tank barges in lieu of tank cars on floats from alongside steamship and other points in such free lighterage and floatage limits in said New York Harbor as defined in said schedules and tariffs, to the rail terminals of said Erie Railroad Company, the transfer from barges to tank cars to be at the expense of the shipper or consignee, for which service a charge of 2 cents per 100 pounds, hereinafter referred to as pumping charge, would be made in addition to said line haul rate; that said rate of 40 cents per 100 pounds and said pumping charge of 2 cents per 100 pounds, were the lawful rates and the only lawful rates applicable on the shipment of palm oil hereinafter described.

4. That during said period on, to wit, September 26, 1932, Colgate-Palmolive-Peet Company, as consignor, tendered to said Erie
41 Railroad Company at a certain point in New York Harbor, to wit, Pier 36 Brooklyn, in the State of New York, said points being within said free lighterage and floatage limits of said New York Harbor as defined in said schedules and tariffs, together with other shipments of palm oil weighing in excess of 240,000 pounds, a shipment of palm oil of an aggregate weight of, to wit, 302,300 pounds, that being five carload lots, which said palm oil had theretofore been transported to said New York Harbor by a certain vessel, to wit, S. S. "West Humhaw," with directions to transport said 302,300 pounds of palm oil from said Pier 36 in said New York Harbor over said connecting railway lines, to said Jeffersonville, consigned to said Colgate-Palmolive-Peet Company.

5. That during said period on, to wit, September 23, 1932, said Colgate-Palmolive-Peet Company did order in writing from said Erie Railroad Company tank barges in lieu of tank cars on floats for the handling, from alongside said vessel in said New York Harbor to the rail terminal of said Erie Railroad Company at Long Dock in the State of New Jersey, of said lot of palm oil which had been transported as aforesaid to said New York Harbor by said vessel.

6. That said Erie Railroad Company did thereupon, at said Pier 36, accept delivery of said 302,300 pounds of palm oil and, tank barges being then and there available, did handle, by and through its agents, said defendant, acting for and employed by said Erie Railroad Company, said lot of palm oil by tank barge from said Pier 36 to said rail terminal at said Long Dock, and at said Long Dock said de-
41a fendant, acting for and on behalf of said Erie Railroad Company, did pump said palm oil into certain railway tank cars bearing the initials and numbers TPCX 102, SHPX 9109, SHPX 9101, SHPX 9116 and SHPX 9118; that thereafter said common carriers did transport by railroad said shipment, loaded in and upon said railroad tank cars as aforesaid, over said connecting railway lines in and through the district of New Jersey and within the jurisdiction of this Court, to said Jeffersonville, and did collect from said Colgate-Palmolive-Peet Company freight charges in the amount of, to wit, $1,209.20, based only upon the aforesaid line haul rate of 40 cents per 100 pounds and said weight of, to wit, 302,300 pounds.

7. That on, to wit, October 17, 1932, said defendant, pursuant to an arrangement and agreement theretofore made with said Colgate-Palmolive-Peet Company and with intent secretly to assume and absorb for the benefit of said Colgate-Palmolive-Peet Company said pumping charge of 2 cents per 100 pounds provided in said schedules and tariffs and applicable upon said shipment of palm oil, did pay and cause to be paid to said Erie Railroad Company, said pumping charge in the sum of, to wit, $60.49, being at the rate of 2 cents per 100 pounds upon the aforesaid weight of, to wit, 302,300 pounds.

8. That said Colgate-Palmolive-Peet Company did pay for the said transportation, including said pumping of the oil from tank barge to tank cars, said sum of $1,209.20, and only said sum of $1,209.20, instead of the lawful aggregate freight charge, applicable under the aforesaid tariffs and schedules, of, to wit, $1,273.69, based and computed upon said line haul rate of 40 cents per 100 pounds and
42 said weight of, to wit, 302,300 pounds, plus said pumping charge of 2 cents per 100 pounds and said weight of, to wit, 302,300; and said Colgate-Palmolive-Peet Company did refrain from paying said common carriers or either of them or said defendant or any other person or corporation, said pumping charge of 2 cents per 100 pounds applicable upon said shipment of palm oil under and by virtue of said tariffs and schedules.

9. That on, to wit, October 17, 1932, Manhattan Lighterage Corporation, defendant aforesaid, in the District of New Jersey and within the jurisdiction of this Court, well knowing the premises aforesaid, unlawfully did knowingly, by means of the device aforesaid, offer, grant and give a concession of 2 cents per 100 pounds in respect of the transportation of the aforesaid shipment of property by said common carriers in interstate commerce whereby said property was transported for said Colgate-Palmolive-Peet Company from said New York Harbor to said Jeffersonville at a less rate and charge than that named and provided in the schedules and tariffs of said common

arriers published and filed as aforesaid; contrary to the form of the tatute in such case made and provided and against the peace and ignity of the United States.

JOHN J. QUINN,
United States Attorney.

The United States of America vs. Manhattan Lighterage Corporaon. Indictment for Viol. Sec. 1, Elkins Act; Sec. 41, Title 49 U. S. C. A. True Bill. J. L. Williamson, Foreman. John J. Quinn, U. S. Attorney.

[File endorsement omitted.]

3 In United States District Court, District of New Jersey

[Title omitted.]

Criminal No. 7919–b

Plea in bar to indictment

Filed June 18, 1937

This defendant, Manhattan Lighterage Corporation, by its attorey in this behalf, Frank M. Swacker, comes into court here, and, havng heard read the said alleged indictment found at the January Term f this court in the year 1937, which said alleged indictment was led April 9, 1937, says that the United States of America ought not urther to prosecute said indictment, or any count thereof, against it, ecause of the following matters and things, which it pleads in bar f its prosecution for any and all of the alleged offenses therein harged, and respectfully avers as follows, to wit:

1. That the alleged offenses attempted to be set forth in each nd every count of the said alleged indictment, if committed at all, ere committed more than three years preceding the return of the lleged indictment herein, during which period said defendant had ot fled justice, and consequently prosecution thereof is barred by he statute of limitations applicable thereto, 18 U. S. Code, section 82.

2. Defendant repeats and realleges the averments of Paragraph 1 hereof, and further shows that, at the April Term in the year 4 1934 of this court, an indictment was returned by the Grand Jury, being file number 6828–b, covering the same offenses ttempted to be alleged in and by the present alleged indictment. That thereafter defendant filed a motion to quash the indictment eturned by the April 1934 Grand Jury, and thereafter, to wit: March 15, 1937, an order was entered at the instance of the United States Attorney in that said cause, reading as follows:

"It appearing that motions to quash the indictment have been iled in the above matter, which said motions raise the same points

as were raised in a similar motion filed in United States vs. Durkee Famous Foods, Inc., No. 6821–b; and

"It further appearing that a memorandum opinion has been filed in the last mentioned case and an order quashing the indictment in that case having been entered in accordance therewith,

"Now, March 15, 1937, for the reasons set forth in the opinion filed in United States vs. Durkee Famous Foods, Inc., No. 6821–b, the indictment in this case be and it is hereby quashed.

"GUY L. FAKE, *Judge.*"

That the indictment herein returned by the January 1937 Grand Jury was not returned in conformity with 18 U. S. Code, section 587, which provides only for the return of a new indictment when one has been found defective, "at any time during the next succeeding term of court following such finding, during which a grand jury thereof shall be in session," inasmuch as the next succeeding term of court following March 15, 1937, was the April Term commencing April 6, 1937.

3. The defendant realleges and reaffirms the averments of Paragraphs 1 and 2 hereof, and further shows that, as appears from the opinion of the court filed in United States vs. Durkee Famous Foods, Inc., No. 6821–b, the indictment returned by the April 1934 Grand Jury, No. 6828–b, was by the court found bad in substance and the allegations thereof not to constitute a crime. The said order quashing said indictment was therefore an appealable order under Title
45 U. C. Code, section 682, and consequently 18 U. S. Code, section 587, has no application to such an order, but is, and is intended to be, confined to the quashing of indictments for defects of form and pleadings, which orders are not appealable under Title U. S. Code, section 682.

All of which said defendant, Manhattan Lighterage Corporation, is ready and willing to verify, and therefore pleads the same in bar of any prosecution or punishment under said indictment or any count thereof, and says that to prosecute or punish it thereunder for any of the alleged offenses charged therein is contrary to the provisions of the statute of limitations, 18 U. S. Code, section 582.

Wherefore, the defendant prays judgment that the said alleged indictment be not further prosecuted against it, and that by this court it may be dismissed and discharged from the said premises without day and the said alleged indictment held for naught and quashed.

Dated Trenton, N. J., June 18, 1937.

MANHATTAN LIGHTERAGE CORPORATION.
Defendant.

By FRANK M. SWACKER,
Attorney,
Office and Post Office Address 120 Broadway, New York City, N.Y.

I hereby certify that the foregoing plea in bar is not interposed for delay, and in my opinion is well founded in point of law.

Dated Trenton, N. J., June 18, 1937.

FRANK M. SWACKER,
Counsel for Defendant,
Manhattan Lighterage Corporation.

[File endorsement omitted.]

In United States District Court

Criminal No. 7919–b

[Title omitted.]

Answer of United States to plea in bar to indictment

Filed Aug. 2, 1937

And now, August 2nd, 1937, comes the United States of America, by John J. Quinn, United States Attorney in and for the District of New Jersey, and in answer to the Plea in Bar to the indictment filed April 9, 1937, in the above matter, respectfully represents:

1. That in answer to the averments contained in paragraph numbered 1. of the Plea in Bar it is admitted that the alleged offenses set forth in each and every count of said indictment were committed more than three years preceding April 9, 1937, the date when said indictment was returned, during which period said defendant had not fled justice, but denies that prosecution of each and every offense alleged to have been committed in said indictment is barred by the statute of limitations.

2. That in answer to the averments contained in paragraph numbered 2 of the Plea in Bar it is admitted that at the April term in the year 1934 of this Court an indictment was returned by the grand jury, at file No. 6828b, covering the same offenses alleged in and by the present indictment; that thereafter defendant herein filed a motion to quash said indictment returned by the April 1934 grand jury, and that thereafter on March 15, 1937, an order was entered on defendant's motion to quash said indictment in the language set out in paragraph 2 of the Plea in Bar, but denies that the indictment herein, which was returned by the January 1937 grand jury, was not returned in conformity with 18 U. S. Code, Section 587, and further avers that under and by virtue of 18 Code, Sec. 587, limitation of prosecution of the offenses alleged in the indictment herein to have been committed by said defendant, was stayed.

3. That in answer to the averments contained in paragraph numbered 3 of said Plea in Bar it is denied that the opinion of the Court

upon which the aforesaid order quashing said previous indictment was made, held that said previous indictment was bad in substance or that no offense described by 49 U. S. Code, Sec. 41, had been alleged to have been committed, but avers that said opinion holding that said previous indictment was insufficient was based upon a construction of said indictment so as to demonstrate the failure of the government to allege essential facts necessary to bring the offense within 49 U. S. Code, Section 41; and in further answer it is averred that whether or not the order made quashing said previous indictment was an appealable order under 18 U. S. Code, Section [illegible] is immaterial in so far as the application of 18 U. S. Code, Section 587, is concerned.

49

4. And in further general answer it is averred that the indictment herein filed April 9, 1937, is otherwise good and sufficient in law.

Wherefore, the United States of America prays that said Plea in Bar be forthwith dismissed and that said defendant be put upon its trial.

UNITED STATES OF AMERICA,
By JOHN J. QUINN,
United States Attorney,
WILLIAM F. SMITH,
Assistant United States Attorney.
DANIEL H. KUNKEL,
Special Assistant to the United States Attorney.

[File endorsement omitted.]

50 In United States District Court, District of New Jersey

Criminal No. 7918–b

UNITED STATES OF AMERICA

v.

DURKEE FAMOUS FOODS, INC.

Criminal No. 7919–b

UNITED STATES OF AMERICA

v.

MANHATTAN LIGHTERAGE CORPORATION

Criminal No. 7920–b

UNITED STATES OF AMERICA

v.

COLGATE-PALMOLIVE-PEET COMPANY

Opinion

(On defendants' pleas in bar to indictments)

NEWARK, N. J.,
Tuesday, June 14, 1938.

fore Hon. GUY L. FAKE, U. S. D. J.

ppearances: Daniel H. Kunkel, Esq., Special Assistant to the ed States Attorney, for the Government. Roger Hinds, Esq., for ndant Durkee Famous Foods, Inc. Frank M. Swacker, Esq., for ndant Manhattan Lighterage Corporation. Messrs. Wall, ght, Carey & Hartpence, by John A. Hartpence, Esq., and Alfred Conway, Esq., for defendant Colgate-Palmolive-Peet Company.

W. W. Heironimnus, Official Reporter.

The COURT. (Orally, at close of argument.) The issues here arise on three indictments, to each of which pleas in bar have filed. This memorandum will be dispositive of the three cases. he defendants were indicted on the 9th of April, 1937, for alleged ations of the Elkins Act, Title 49, Section 41.

he acts complained of in the indictments having been committed, rding to the dates set forth therein, more than three years prior he filing of the indictments. Section 582 of Title 18 of the U. S. e provides as follows:

No person shall be prosecuted, tried, or punished for any offense, capital, except as provided in Section 584 of this Title, unless the ctment is found or action is instituted within three years next r such offense shall have been committed."

is contended for the Government that the pleas should not be ained because Section 587 of Title 18 of the U. S. Code provides ollows:

Whenever an indictment is found defective or insufficient for any e after the period prescribed and the applicable Statute of Limi- ons has expired, a new indictment may be returned at any time ng the next succeeding term of Court following such finding, ng which the Grand Jury thereof shall be in session."

is urged that a reasonable and proper consideration of this sec- causes it to become effective as to the then existing term of rt, notwithstanding the fact that the statute itself is silent as to the existing term. (Citing Endlich on Interpretation of Statutes, es 599, etc. U. S. v. N. Y. Central Railroad, 212 U. S. 509; U. S. v. Koenig Coal Co., 270 U. S. 512; U. S. vs. Baltimore Post Co., 2 Fed. (2d) 761, affirmed 268 U. S. 388; Ozawa vs. U. S., 260 U. S. 178.)

ounsel for the defendants argue that to so construe the statute ld cause the Court to enter the sphere of the legislature and in ct amend the Act to read as follows:

"A new indictment may be returned at any time during the next succeeding term of court, following such finding, during which the Grand Jury thereof shall be in session and as well at the Term in which the indictment is found defective."

Moreover, it is urged that Section 587 must be strictly construed because it is an exception to the Statute of Limitations.

Other arguments are offered by counsel for the defense, which appear in defendants' briefs. The cite the following cases to sustain their position: U. S. v. Sheldon, 2 Wheaton 119–121 and 122. U. S. vs. McElvaine, 272 U. S. 633 at 639. U. S. vs. Scherton, 285 U. S. 518 at 521–2. 16 Corpus Juris 228, Section 350.

The indictments were returned by a Grand Jury sitting for the January Term of Court on April 9, 1937, but within the time fixed by law for the April Term of Court at Newark, the January Term having been extended by an order of the Court.

At the time the previous indictments were quashed by this Court, the three-year Statute of Limitations had then run against the alleged offenses.

* * * * * * *

NEWARK, N. J.,
Monday, June 27, 1938.

(Hearing continued from June 14, 1938. Same appearances.)

THE COURT. (Orally, at close of argument.) At the last session I stated the facts and raised the issues upon which counsel have appeared before me today. Both sides have been diligent in their endeavors to assist the Court in ascertaining the law to be followed here. No cases have been discovered bearing upon a construc-
53 tion of the section of the Statute of Limitations which is here involved. This has resulted in much research in an endeavor to find an analogous situation, and upon careful consideration of the arguments presented by counsel, as well as a consideration of the cases they have cited, it is my conclusion that the Court, being without power to amend the statute involved, and it appearing that the statute itself contains no ambiguity, either patent or latent, must give to the statute the generally accepted meaning of the language used therein. This leads to the inescapable conclusion that where an indictment has been found to be defective after the passage of the prescribed period of limitation, the one and only Grand Jury which can hand down a new indictment is that Grand Jury which is authorized to act at the term next succeeding the term at which the Court found the indictment to be defective; and it appearing, as it does here, that the indictments under review were not found by a Grand Jury authorized as aforesaid, the indictments must necessarily fall.

The pleas in bar are therefore sustained.

54 In United States District Court, District of New Jersey

On Plea in Bar. Criminal No. 7919–B

UNITED STATES OF AMERICA

vs.

MANHATTAN LIGHTERAGE CORPORATION, DEFENDANT

Order sustaining plea in bar

Filed June 28, 1938

This matter being opened to the Court by Frank M. Swacker, Esq., of counsel with the defendant, Manhattan Lighterage Corporation, upon said defendant's Plea in Bar to the indictment herein and each and every count thereof, and due notice to plead having been duly served upon the attorney for said defendant by the United States Attorney, and the United States of America appearing by John J. Quinn, Esq., United States Attorney, and Daniel H. Kunkel, Esq., Special Assistant United States Attorney, and the said defendant, Manhattan Lighterage Corporation appearing by Frank M. Swacker, Esq., its attorney, and the Court having heard and considered the matter on argument, and on the briefs of the respective counsel, and it appearing that said Plea in Bar is good and sufficient and should be sustained;

It is, on this 28 day of June 1938, ordered that the said Plea in Bar to said indictment herein be and the same is hereby sustained, and that said indictment be not further prosecuted against said defendant, and that said indictment be and the same is hereby accordingly dismissed, discharged, held for nought and quashed.

GUY L. FAKE,
United States District Court Judge.

Consented to as to form only:

JOHN J. QUINN,
United States Attorney.

By: DANIEL H. KUNKEL,
Special Assistant United States Attorney.

55 [File endorsement omitted.]

56 In United States District Court, District of New Jersey

Order continuing the January 1937 Term of Court at Trenton, New Jersey, to the April 1937 Term of Court at Newark, New Jersey

Filed April 5, 1937

It being presented to the Court by John J. Quinn, United States Attorney for the District of New Jersey, that certain sentences are

still pending in cases before this Court, and other business of the United States is still pending before the Court, and applications being made,

It is, thereupon on this 5th day of April 1937, ordered that the January 1937 Term of this Court be and the same is hereby extended and continued during the April 1937 Term and until the further order of this Court for the following and all other purposes:

1. In order that the Grand Jury of that term may dispose of its unfinished business.

2. In order that the sentences set forth on the annexed list marked "Schedule A" and all other sentences pending before the Court may be imposed.

3. In order that any other business, procedure or practice pertaining to the Court or the Government of the United States may be transacted identically as if the January 1937 Term of Court had not expired.

FORMAN, *Judge.*

58 [File endorsement omitted.]

59 In United States District Court, for the District of New Jersey

[Title omitted.]

Criminal No. 7919–B

Petition for appeal

Filed July 25, 1938

Now comes the United States of America, plaintiff, by its counsel, and says that on June 28, 1938, this court rendered its judgment in favor of the defendant against the plaintiff, in which judgment and proceedings had prior thereto in said cause certain errors were committed to the prejudice of the plaintiff, all of which will more fully appear from the assignment of errors herewith filed.

Wherefore, United States of America prays that an appeal may issue in its behalf to the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in said cause, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

John J. Quinn,
JOHN J. QUINN,
United States Attorney.

Dated this 25th day of July 1938.
[File endorsement omitted.]

60 In United States District Court for the District of New Jersey

[Title omitted.]

Criminal No. 7919–B

Assignment of errors

Filed July 25, 1938

United States of America, plaintiff, by its counsel, now comes and, in connection with its petition for an appeal, files the following assignment of errors upon which it will rely in its appeal to the Supreme Court of the United States from the final judgment rendered by this Court on June 28, 1938.

The District Court erred:

1. In sustaining the plea in bar.

2. In not overruling and dismissing the plea in bar.

3. In holding and adjudging that the statute of limitations had barred the prosecution of the offenses alleged in the several counts of the indictment.

4. In holding and adjudging that the Act of May 10, 1934 (U. S. C. Title 18, Sec. 587), did not limit the application of the statute of limitations (U. S. C. Title 18, Sec. 582) so as to permit the new indictment to be returned by the grand jury empaneled at and in session during the same term of court at which the prior indictment was found defective and insufficient.

5. In holding and adjudging that the Act of May 10, 1934 (U. S. C. Title 18, Sec. 587), was effective to stay the statute of limitations only where the new indictment is returned by a grand jury in session during the next succeeding term of court following the
61 term at which the prior indictment was found defective or insufficient.

6. In failing and refusing to construe the statutes on which the new indictment was founded as permitting the return of the new indictment by the grand jury empaneled at and for and in session during the same term of court at which the prior indictment was found defective or insufficient.

7. In failing and refusing to construe the Act of May 10, 1934 (U. S. C. Title 18, Sec. 587), as permitting the return of the new indictment by the grand jury empaneled at and for and in session during the term of court at which the prior indictment was found defective or insufficient.

8. In failing and refusing to construe the Act of May 10, 1934 (U. S. C. Title 18, Sec. 587), as permitting the return of the new indictment by the first grand jury in session upon or following the date upon which the prior indictment was found defective or insufficient, regardless of whether such grand jury was empaneled for the

same term, or the next succeeding term, or some still later term following the term of court at which the prior indictment was found defective or insufficient.

9. In entering the order of June 28, 1938, sustaining the plea in bar and dismissing and quashing the indictment.

John J. Quinn,
JOHN J. QUINN.
United States Attorney.

Dated this 25th day of July 1938.
[File endorsement omitted.]

62 In United States District Court for the District of New Jersey

Criminal No. 7919–B

[Title omitted.]

Order allowing appeal

Filed July 25, 1938

United States of America, plaintiff, having by its counsel made and filed its petition praying an appeal to the Supreme Court of the United States from the final judgment of this Court entered June 28, 1938, and having also made and filed an assignment of errors, and having in all respects conformed to the statutes and rules of court in such case made and provided:

It is ordered and adjudged that the appeal be and the same is hereby allowed as prayed and made returnable within forty (40) days from the date hereof, and the clerk is directed to transmit forthwith to the Supreme Court of the United States a properly authenticated transcript of the record, proceedings and papers on which said final judgment was made and entered.

This 25 day of July 1938.

JOHN BOYD AVIS,
United States District Judge.

[File endorsement omitted.]

63 [Citation in usual form showing service on Frank M. Swacker, filed July 30, 1938, omitted in printing.]

[File endorsement omitted.]

64 In United States District Court, District of New Jersey

No. 7919b

[Title omitted.]

Docket entries

1937
Apr. 9—Indictment for Violating Section 1, Elkins Act &c filed.
June 1—Ordered adjourned to June 18, 1937.
18—Plea in bar by Frank M. Swacker, 120 Broadway, N. Y. City, Atty, filed.
Aug. 2—Answer of United States to plea in bar filed.
1938
June 14—Argument on plea in bar before Judge Fake.
"—Ord. off to June 27, 1938.
27—Oral Opinion by Judge Fake sustaining plea in bar &c filed.
28—Order Dismissing Indictment, sustaining plea in bar &c filed (Fk).
July 25—Petition for Appeal filed.
"—Assignment of Errors filed.
"—Order allowing Appeal filed (Avis).
"—Citation issued.
"—Statement as to Jurisdiction filed.
30—Citation filed.
"—Notice to Appellee filed.
"—Praecipe for Transcript of Record filed.

65 In United States District Court for the District of New Jersey

Criminal No. 7919–B

[Title omitted.]

Praecipe for transcript of record

Filed July 30, 1938

To the CLERK OF THE DISTRICT COURT:

Please transmit to the Supreme Court of the United States as the transcript of record in the above entitled case, the following pleadings, documents and records:

1. Indictment.
2. Plea in bar.
3. Answer to plea in bar.
4. Opinion of court sustaining the plea in bar.
5. Order on opinion sustaining the plea in bar and quashing the indictment.
6. Order of Court extending the January 1937 Trenton Term.

7. Petition for appeal.
8. Assignment of errors.
9. Statement as to jurisdiction.
10. Order allowing appeal.
11. Notice of service on appellee of petition for appeal, order allo
ing appeal, assignment of errors, and statement as to jurisdiction.
12. Citation on appeal.
13. All docket entries in proper order.
66 14. Praecipe for transcript of record.
15. Clerk's certificate.

John J. Quinn,
JOHN J. QUINN,
United States Attorney.

Service of a copy of the above praecipe is hereby acknowledg
this 25 day of July 1938.

FRANK M. SWACKER,
Attorney for defendant.

[File endorsement omitted.]

67 [Clerk's certificate to foregoing transcript omitted
printing.]

68 In United States District Court, District of New Jersey

Indictment

In the District Court of the United States of America in and f
the District of New Jersey, at the April Term thereof, in the ye
1934.

The Grand Jurors of the United States of America duly e
paneled, sworn and charged to inquire in and for the body of th
same District of New Jersey, upon their oaths present:

COUNT 1

1. That throughout the period extending from January 1, 193
to and including August 31, 1933, Manhattan Lighterage Corpor
tion, hereinafter called defendant, was and still is a corporation o
the State of New York, and was engaged, among other things, i
the operation of tank barges in New York Harbor and in the busi
ness of transporting by tank barge certain bulk fluid commoditie
to wit, palm oil, cocoanut oil, olive oil foots, china wood oil, perill
oil, soya bean oil, fish oil, and molasses, from alongside steamshi
and other points in said New York Harbor to the railway line
and rail terminals of common carriers by railroad located at point
contiguous to New York Harbor.

2. That throughout said period Lehigh Valley Railroad Compan
and Pere Marquette Railway Compa.y, were and still are corpora
tion common carriers engaged in the transportation of property, i

interstate commerce, by railroad, for hire, and over and by means of their respective connecting railway lines, operated a through railway route for the transportation of property including palm oil, in carload lots, from alongside vessels and other points in said
69 New York Harbor to a certain point on the line of said Pere Marquette Railway Company, to wit, Chicago in the State of Illinois.

3. Throughout said period said common carriers had printed and had published and had filed with the Interstate Commerce Commission schedules of tariffs of rates and charges which showed a joint rate and charge of said carriers for the transportation of palm oil, in carload lots, from said New York Harbor to said Chicago, over said through railway route, of 40 cents per 100 pounds; that said schedules and tariffs providing said rate of 40 cents per 100 pounds further provided that said rate applied from points within free lighterage limits of said New York Harbor as provided for and in accordance with certain tariffs and schedules of rules, regulations, and charges governing the acceptance and handling of freight at, and for all deliveries in, said New York Harbor, which said tariffs and schedules had been duly printed and had been published and had been filed with the Interstate Commerce Commission, by said Lehigh Valley Railroad Company; that said last mentioned tariffs and schedules provided and defined free lighterage and floatage limits in said New York Harbor to be:

North River:

New York side—Battery to 135th Street.

New Jersey side—National Storage Docks, Communipaw, to and including Fort Lee, N. J.

East River and Harlem River:

New York side—Battery to Jerome Avenue Bridge, including Harlem River side of Ward's and Randall's Islands.

Brooklyn side—From Pot Cove, Astoria, to and including Newton and Dutch Kills Creeks, and points in Wallabout Canal, and to Hamilton Avenue Bridge, Gowanus Canal, and to and including 69th Street, South Brooklyn (Bay Ridge).

70 New York Bay:

Points on north and east shore of Staten Island between Bridge Creek (Arlington) and Clifton, both inclusive, and including Shooter Island.

Points on the New Jersey shore of New York Bay and on the Kill von Kull between Constable Hook and Avenue C, Bayonne City, opposite Port Richmond, S. I.;

that said last mentioned tariffs and schedules further provided that property therein specified as articles "not lighterage free," including palm oil, when loaded in tank cars, would be accorded free floatage privilege in lots of six cars or over, or when loaded in less than six cars, provided the total weight of shipments equaled or exceeded

240,000 pounds; that said last mentioned tariffs and schedules further provided that when such articles therein designated as "not lighterage free," including palm oil, in lots of 240,000 pounds, were handled in tank barges in lieu of tank cars on floats from alongside steamships and other points in said free lighterage and floatage limits in said New York Harbor, the transfer from barges to tank cars would be at the expense of the shipper, for which service a charge (hereinafter referred to as pumping charge) of 2 cents per 100 pounds would be made in addition to the rate from New York; that said rate of 4½ cents per 100 pounds and said pumping charge of 2 cents per 100 pounds, were the lawful rates and the only lawful rates applicable on the shipment of palm oil hereinafter described.

4. That prior to August 12, 1932, said Lehigh Valley Railroad Company and said defendant had entered into an agreement and arrangement whereby said defendant agreed and undertook, among other things, to furnish all necessary marine equipment and to transport in tank barges of said defendant all shipments of oils and other bulk commodities as designated by said Lehigh Valley Railroad Company from designated points within said free lighterage and
71 floatage limits of said New York Harbor, to designated piers of said Lehigh Valley Railroad Company in the State of New Jersey and other points, including the pumping of shipments from tank barges into tank cars designated and placed by said Lehigh Valley Railroad Company on and at said piers, for and at a compensation of 6½ cents per 100 pounds; that said arrangement and agreement of employment was in full force and effect throughout all times mentioned in this indictment.

5. That during said period on, to wit, August 12, 1932, Durkee Famous Foods, Inc., as consignor, tendered to said Lehigh Valley Railroad Company at a certain point in New York Harbor, to wit, Pier 60, North River, in the State of New York, being within said free lighterage and floatage limits of said New York Harbor, together with other shipments of palm oil weighing in excess of 240,000 pounds, a shipment of palm oil of an aggregate weight of, to wit, 120,880 pounds, that being two carload lots, which said palm oil was a part of a larger lot of oil theretofore transported to said New York Harbor by a certain vessel, to wit, "Georgic", with directions to transport said 120,880 pounds of palm oil from said New York Harbor over said connecting railway lines, to said Chicago, consigned to said Durkee Famous Foods, Inc.; that said Lehigh Valley Railroad Company by and through said defendant, acting for and employed by said Lehigh Valley Railroad Company under said arrangement and agreement, then and there accepted delivery of said palm oil, and transported said palm oil by tank barge from said Pier 60, North River, to the rail terminal of said Lehigh Valley Railroad Company at Claremont Terminal in the State of New Jersey and at said Claremont Terminal pumped said palm oil into certain railway tank cars bearing the initials and numbers, ISTX 227 and ISTX 285; that

thereafter said common carriers transported said shipment
2 loaded in and upon said railway tank cars, as aforesaid, over said connecting railway line, and in and through the District of New Jersey and within the jurisdiction of this Court, to said Chicago, and did deliver said shipment at said Chicago to said Durkee Famous Foods, Inc., and did collect freight charges in the amount of $483.60 based only upon the aforesaid rate of 40 cents per 100 pounds.

6. That the lawful freight charges applicable upon said shipment under the aforesaid tariffs and schedules was $507.72 being the sum of said line haul rate of 40 cents per 100 pounds based on the aforesaid weight of, to wit, 120,880 pounds and said pumping charge of 2 cents per 100 pounds based upon the aforesaid weight of, to wit, 120,880 pounds.

7. That in accordance with said arrangement and agreement between said Lehigh Valley Railroad Company and said defendant said Lehigh Valley Railroad Company did on, to wit, August 17, 1932, pay to said defendant the sum of, to wit, $78.57 for the lightering by tank barge of said palm oil from said Pier 60, North River, to said rail terminal of said Lehigh Valley Railroad Company at said Claremont Terminal and for the pumping of said palm oil from said tank barge into said tank railway cars at said Claremont Terminal, said sum of, to wit, $78.57 being based and computed at said rate of 1½ cents per 100 pounds.

8. That on, to wit, August 17, 1932, said defendant, pursuant to said arrangement theretofore made with said Durkee Famous Foods, Inc., and with intent secretly to assume and absorb for the benefit of said Durkee Famous Foods, Inc., said pumping charge of 2 cents per 100 pounds provided in said tariffs and schedules of rules, regulations, and charges at said New York Harbor, printed, published, and filed by said Lehigh Valley Railroad Company, as aforesaid, applicable upon said shipment of palm oil, paid to said Lehigh Valley Railroad Company, the sum of $24.28, being the rate of 2 cents per 100 pounds upon the aforesaid weight of, to wit, 120,880 pounds.

9. That said defendant did assume and absorb, for the benefit and advantage of said Durkee Famous Foods, Inc., said pumping charge of 2 cents per 100 pounds.

10. That on, to wit, August 17, 1932, said Manhattan Lighterage Corporation, defendant aforesaid, through and by means of a device employed with purpose to secretly absorb and assume said pumping charge of 2 cents per 100 pounds, for the benefit and advantage of said Durkee Famous Foods, Inc., and thereby reduce said lawfully published and filed tariffs, rates and charges, chargeable to said Durkee Famous Foods, Inc., as aforesaid, and then and there well knowing the provisions of the aforesaid lawfully published and filed tariffs and schedules, and the premises aforesaid, unlawfully did knowingly offer, grant and give to said Durkee Famous Foods, Inc., a concession and discrimination in the amount of 2 cents on each 100 pounds

of said palm oil which was transported in interstate commerce into and through the District of New Jersey, from said New York Harbor to said Chicago whereby said shipment of palm oil was transported by railroad as aforesaid at and for a rate of 40 cents per 100 pounds, which was less than said rates aggregating 42 cents per 100 pounds named in the tariffs and schedules published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

11. That said Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania, and Manhattan Oil Transit Corporation, a corporation of the State of New York, and one S. C. Blod-
74 good, an officer and agent of Manhattan Lighterage Corporation, defendant aforesaid, well knowing the premises aforesaid, then and there unlawfully did knowingly aid and abet Manhattan Lighterage Corporation, defendant aforesaid, the said offense in manner and form aforesaid, to do and commit; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT 2

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs numbered 1, 2, 3, and 4 of the first count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

* * * * * * *

COUNT 3

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs numbered 1, 2, 3, and 4 of the first count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

* * * * * * *

COUNT 4

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs numbered 1, 2, 3, and 4
75 of the first count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

* * * * * * *

COUNT 5

And the Grand Jurors aforesaid, upon their oaths aforesaid, do rther present:

1. The facts set forth in paragraphs numbered 1, 2, 3, and 4 of e first count of this indictment, which said facts are hereby referred and incorporated in this count as fully as if they were herein peated.

* * * * * * *

COUNT 6

And the Grand Jurors aforesaid, upon their oaths aforesaid, do rther present:

* * * * * * *

3. That throughout said period said common carriers had printed nd had published and had filed with the Interstate Commerce Commission schedules of tariffs of rates and charges which showed a oint rate and charge of said carriers for the transportation of eanut oil, in carload lots, from said New York Harbor to said hicago, over said through railway route, of 40 cents per 100 pounds; at said schedules and tariffs providing said rate of 40 cents per 0 pounds further provided that said rate applied from points ithin free lighterage limits of said New York Harbor as provided r and in accordance with certain tariffs and schedules of rules, gulations, and charges governing the acceptance and handling of eight at, and for all deliveries in, said New York Harbor, which said tariffs and schedules had been duly printed and had been published and had been filed with the Interstate Commerce Commission by said Lehigh Valley Railroad Company; that id last mentioned tariffs and schedules provided and defined free ghterage and floatage limits in said New York Harbor to be:

North River:

New York side—Battery to 135th Street.

New Jersey side—National Storage Docks, Communipaw, to and including Fort Lee, N. J.

East River and Harlem River:

New York side—Battery to Jerome Avenue Bridge, including Harlem River side of Ward's and Randall's Islands.

Brooklyn side—From Pot Cove, Astoria, to and including Newtown and Dutch Kills Creeks, and points in Wallabout Canal, and to Hamilton Avenue Bridge, Gowanus Canal, and to and including 69th Street, South Brooklyn (Bay Ridge).

New York Bay:

Points on north and east shore of Staten Island between Bridge Creek (Arlington) and Clifton, both inclusive, and including Shooter Island.

Points on the New Jersey shore of New York Bay and on the Kill von Kull between Constable Hook and Avenue C, Bayonne City, opposite Port Richmond, S. I.;

that said last mentioned tariffs and schedules further provided that property therein specified as articles "not lighterage free," including cocoanut oil, when loaded in tank cars, would be accorded free floatage privilege in lots of six cars or over, or when loaded in less than six cars, provided the total weight of shipments equaled or exceeded 240,000 pounds; that said last mentioned tariffs and schedules further provided that when such articles therein designated as "not lighterage free," including cocoanut oil, in lots of 240,000 pounds, were handled in tank barges in lieu of tank cars on floats from alongside steamship and other points in said free lighterage and floatage limits in said New York Harbor, the transfer from barges to tank cars would be at the expense of the shipper, for which service a charge (hereinafter referred to as pumping charge), of 2 cents per 100 pounds would be made in addition to the rate from New York; that said rate of 40 cents per 100 pounds and said pumping charge of 2 cents per 100 pounds, were the lawful rates and the only lawful rates applicable on the shipment of cocoanut oil hereinafter described.

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COUNT 7

And the Grand Jurors aforesaid, upon said oaths aforesaid, do further present:

1. The facts set forth in paragraph numbered 1 of the first count and in paragraphs numbered 2, 3, and 4 of the sixth count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

* * * * * * *

COUNT 8

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraph numbered 1 of the first count and in paragraphs numbered 2, 3, and 4 of the sixth count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

* * * * * * *

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COUNT 9

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraph numbered 1 of the first count and in paragraphs numbered 2, 3, and 4 of the sixth count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

* * * * * * *

COUNT 10

nd the Grand Jurors aforesaid, upon their oaths aforesaid, do
her present:

The facts set forth in paragraph numbered 1 of the first count in paragraphs numbered 2, 3, and 4 of the sixth count of this ctment, which said facts are hereby referred to and incorporated his count as fully as if they were herein repeated.

* * * * * * *

COUNT 11

nd the Grand Jurors aforesaid, upon their oaths aforesaid, do
her present:

* * * * * * *

That throughout said period said common carriers had printed had published and had filed with the Interstate Commerce Commsion schedules of tariffs of rates and charges which showed a t rate and charge of said carriers for the transportation of cocoanut oil, in carload lots, from said New York Harbor to said Columbus, over said through railway route, of 35 cents per 100 pounds; that said schedules and tariffs providing said rate 35 cents per 100 pounds further provided that said rate applied m points within free lighterage limits of said New York Harbor provided for and in accordance with certain tariffs and schedules rules, regulations and charges governing the acceptance and hand- of freight at, and for all deliveries in, said New York Harbor, ich said tariffs and schedules had been duly printed and had been blished and had been filed with the Interstate Commerce Commis-, by said The Delaware, Lackawanna and Western Railroad Com- y; that said last mentioned tariffs and schedules provided and ined free lighterage and floatage limits in said New York Harbor se:

North River:

New York side—Battery to 135th Street.

New Jersey side—National Storage Docks, Communipaw, to and including Fort Lee, N. J.

East River and Harlem River:

New York side—Battery to Jerome Avenue Bridge, including Harlem River side of Ward's and Randall's Islands.

Brooklyn side—From Pot Cove, Astoria, to and including Newtown and Dutch Kills Creeks, and points in Wallabout Canal, and to Hamilton Avenue Bridge, Gowanus Canal, and to and including 69th Street, South Brooklyn (Bay Ridge).

New York Bay:

Points on north and east shore of Staten Island between Bridge Creek (Arlington) and Clifton, both inclusive, and including Shooter Island.

New York Bay—Continued.

Points on the New Jersey shore of New York Bay and on the Kill von Kull between Constable Hook and Avenue C, Bayonne City, opposite Port Richmond, S. I.;

that said last mentioned tariffs and schedules further provided that property therein specified as articles "not lighterage free", including cocoanut oil, when loaded in tank cars, would be accorded
80 free floatage privilege in lots of six cars or over, or when loaded in less than six cars, provided the total weight of shipments equaled or exceeded 240,000 pounds; that said last mentioned tariffs and schedules further provided that when such articles therein designated as "not lighterage free", including cocoanut oil, in lots of 240,000 pounds, were handled in tank barges in lieu of tank cars on floats from alongside steamship and other points in said free lighterage and floatage limits in said New York Harbor, the transfer from barges to tank cars would be at the expense of the shipper, for which service a charge (hereinafter referred to as pumping charge) of 2 cents per 100 pounds would be made in addition to the rate from New York; that said rate of 35 cents per 100 pounds and said pumping charge of 2 cents per 100 pounds were the lawful rates and the only lawful rates applicable on the shipment of cocoanut oil hereinafter described.

* * * * * * *

COUNT 12

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraph numbered 1 of the first count and in paragraphs numbered 2, 3, and 4, of the eleventh count, of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

* * * * * * *

COUNT 13

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

81 1. The facts set forth in paragraph numbered 1 of the first count and in paragraphs numbered 2, 3, and 4, of the eleventh count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

* * * * * * *

COUNT 14

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraph numbered 1 of the first count and in paragraphs numbered 2, 3, and 4 of the eleventh count of this

ictment, which said facts are hereby referred to and incorporated his count as fully as if they were herein repeated.

* * * * * * *

COUNT 15

And the Grand Jurors aforesaid, upon their oaths aforesaid, do ther present:

. The facts set forth in paragraph numbered 1 of the first count l in paragraphs numbered 2, 3, and 4 of the eleventh count of this ictment, which said facts are hereby referred to and incorporated his count as fully as if they were herein repeated.

* * * * * * *

COUNT 16

And the Grand Jurors aforesaid, upon their oaths aforesaid, do ther present:

* * * * * * *

3. That throughout said period said common carriers had printed and had published and had filed with the Interstate Commerce Commission schedules of tariffs of rates and rges which showed a joint rate and charge of said carriers for the nsportation of cocoanut oil, in carload lots, from said New York rbor to said Columbus, over said through railway route, of 35 ts per 100 pounds; that said schedules and tariffs providing said e of 35 cents per 100 pounds further provided that said rate ap- ed from points within free lighterage limits of said New York rbor as provided for and in accordance with certain tariffs and edules of rules, regulations, and charges governing the accept- e and handling of freight at, and for all deliveries in, said New rk Harbor, which said tariffs and schedules had been duly printed d had been published and had been filed with the Interstate Com- rce Commission, by said The Delaware, Lackawanna and Western ilroad Company; that said last mentioned tariffs and schedules ovided and defined free lighterage and floatage limits in said New rk Harbor to be:

North River:

New York side—Battery to 135th Street.

New Jersey side—National Storage Docks, Communipaw, to and including Fort Lee, N. J.

East River and Harlem River:

New York side—Battery to Jerome Avenue Bridge, including Harlem River side of Ward's and Randall's Islands.

Brooklyn side—From Pot Cove, Astoria, to and including Newtown and Dutch Kills Creeks, and points in Wallabout Canal, and to Hamilton Avenue Bridge, Gowanus Canal, and to and including 69th Street, South Brooklyn (Bay Ridge).

New York Bay:

Points on north and east shore of Staten Island between Bridge Creek (Arlington) and Clifton, both inclusive, and including Shooter Island.

83 Points on the New Jersey shore of New York Bay and on the Kill von Kull, between Constable Hook and Avenue C, Bayonne City, opposite Port Richmond, S. I.;

that said last mentioned tariffs and schedules further provided that property therein specified as articles "not lighterage free," including cocoanut oil, when loaded in tank cars, would be accorded free floatage privilege in lots of six cars or over, or when loaded in less than six cars, provided the total weight of shipments equaled or exceeded 240,000 pounds; that said last mentioned tariffs and schedules further provided that when such articles therein designated as "not lighterage free," including cocoanut oil, in lots of 240,000 pounds, were handled in tank barges in lieu of tank cars on floats from alongside steamship and other points in said free lighterage and floatage limits in said New York Harbor, the transfer from barges to tank cars would be at the expense of the shipper, for which service a charge (hereinafter referred to as pumping charge) of 2 cents per 100 pounds would be made in addition to the rate from New York; that said rate of 3 cents per 100 pounds and said pumping charge of 2 cents per 100 pounds, were the lawful rates and the only lawful rates applicable on the shipment of cocoanut oil hereinafter described.

* * * * * * *

COUNT 17

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraph numbered 1 of the first count and in paragraphs numbered 2, 3, and 4 of the sixteenth count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

* * * * * * *

84 COUNT 18

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraph numbered 1 of the first count and in paragraphs numbered 2, 3, and 4 of the sixteenth count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

* * * * * * *

COUNT 19

And the Grand Jurors aforesaid, upon their oaths aforesaid, do ther present:

. The facts set forth in paragraph numbered 1 of the first count l in paragraphs numbered 2, 3, and 4 of the sixteenth count of s indictment, which said facts are hereby referred to and incor- ated in this count as fully as if they were herein repeated.

* * * * * * *

COUNT 20

And the Grand Jurors aforesaid, upon their oaths aforesaid, do ther present:

. The facts set forth in paragraph numbered 1 of the first count l in paragraphs numbered 2, 3, and 4 of the sixteenth count of this ictment, which said facts are hereby referred to and incorporated this count as fully as if they were herein repeated.

* * * * * * *

COUNT 21

And the Grand Jurors aforesaid, upon their oaths aforesaid, do ther present:

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. That throughout said period said common carriers had printed d had published and had filed with the Interstate Commerce Com- ssion schedules of tariffs of rates and charges which showed a nt rate and charge of said carriers for the transportation of palm , in carload lots, from said New York Harbor to said Monessen, r said through railway route, of 30½ cents per 100 pounds, and oint rate and charge for the transportation of palm oil, in carload s, from said New York Harbor, over said through railway route, said New Castle, of 34 cents per 100 pounds; that said schedules and riffs providing said rates of 30½ cents per 100 pounds and 34 cents r 100 pounds, further provided that said rates applied from points thin free lighterage limits of said New York Harbor as provided r and in accordance with certain tariffs and schedules of rules, gulations, and charges governing the acceptance and handling of eight at, and for all deliveries in, said New York Harbor, which id tariffs and schedules had been duly printed and had been pub- hed and had been filed with the Interstate Commerce Commission, said The New York Central Railroad Company; that said last entioned tariffs and schedules provided and defined free lighterage d floatage limits in said New York Harbor to be:

North River:

New York side—Battery to 135th Street.

New Jersey side—National Storage Docks, Communipaw, to and including Fort Lee, N. J.

86 East River and Harlem River:

New York side—Battery to Jerome Avenue Bridge, includi
Harlem River side of Ward's and Randall's islands.

Brooklyn side—From Pot Cove, Astoria, to and includi
Newtown and Dutch Kills Creeks, and points in Wall
bout Canal, and to Hamilton Avenue Bridge, Gowan
Canal, and to and including 69th Street, South Brookl
(Bay Ridge).

New York Bay:

Points on north and east shore of Staten Island betwe
Bridge Creek (Arlington) and Clifton, both inclusive, a
including Shooter Island.

Points on the New Jersey shore of New York Bay and o
the Kill von Kull between Constable Hook and Avenue C
Bayonne City, opposite Port Richmond, S. I.;

that said last mentioned tariffs and schedules further provided th
property therein specified as articles "not lighterage free," includi
palm oil, when loaded in tank cars, would be accorded free floata
privilege in lots of six cars or over, or when loaded in less than s
cars, provided the total weight of shipments equaled or exceede
240,000 pounds; that said last mentioned tariffs and schedules furth
provided that when such articles therein designated as "not lighterag
free," including palm oil, in lots of 240,000 pounds, were handled i
tank barges in lieu of tank cars on floats from alongside steamshi
and other points in said free lighterage and floatage limits in sai
New York Harbor, the transfer from barges to tank cars would be m
the expense of the shipper, for which service a charge (hereinafte
referred to as pumping charge) of 2 cents per 100 pounds would b
made in addition to the rate from New York.

* * * * * * *

87

COUNT 22

And the Grand Jurors aforesaid, upon their oaths aforesaid, do
further present:

1. The facts set forth in paragraph numbered 1 of the first coun
and in paragraphs numbered 2, 3, and 4 of the twentieth count o
this indictment, which said facts are hereby referred to and incor
porated in this count as fully as if they were herein repeated.

* * * * * * *

COUNT 23

And the Grand Jurors aforesaid, upon their oaths aforesaid, do
further present:

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3. That throughout said period said common carriers had printed
and had published and had filed with the Interstate Commerce

mmission schedules of tariffs of rates and charges which showed joint rate and charge of said carriers for the transportation of lm oil, in carload lots, from said New York Harbor to said Jefferville, over said through railway route, of 40 cents per 100 pounds; at said schedules and tariffs providing said rate of 40 cents per 0 pounds further provided that said rate applied from points thin free lighterage limits of said New York Harbor as provided r and in accordance with certain tariffs and schedules of rules, gulations, and charges governing the acceptance and handling of eight at, and for all deliveries in, said New York Harbor, which id tariffs and schedules had been duly printed and had been published and had been filed with the Interstate Commerce Commission, by said Erie Railroad Company; that said last mentioned riffs and schedules provided and defined free lighterage and floatage limits in said New York Harbor to be:

North River:

New York side—Battery to 135th Street.

New Jersey side—National Storage Docks, Communipaw, to and including Fort Lee, N. J.

East River and Harlem River:

New York side—Battery to Jerome Avenue Bridge including Harlem River side of Ward's and Randall's Islands.

Brooklyn side—From Pot Cove, Astoria, to and including Newtown and Dutch Kills Creeks, and points in Wallabout Canal, and to Hamilton Avenue Bridge, Gowanus Canal, and to and including 69th Street, South Brooklyn (Bay Ridge).

New York Bay:

Points on north and east shore of Staten Island between Bridge Creek (Arlington) and Clifton, both inclusive, and including Shooter Island.

Points on the New Jersey shore of New York Bay and on the Kill von Kull between Constable Hook and Avenue C, Bayonne City, opposite Port Richmond, S. I.;

at said last mentioned tariffs and schedules further provided at property therein specified as articles "not lighterage free," inding palm oil, when loaded in tank cars, would be accorded free ntage privilege in lots of six cars or over, or when loaded in less an six cars, provided the total weight of shipments equaled or ceeded 240,000 pounds; that said last mentioned tariffs and schedes further provided that when such articles therein designated as ot lighterage free," including palm oil, in lots of 240,000 pounds, ere handled in tank barges in lieu of tank cars on floats from ongside steamship and other points in said free lighterage and ntage limits in said New York Harbor, the transfer from barges tank cars would be at the expense of the shipper, for which service charge hereinafter referred to as pumping charge of 2 cents per

100 pounds would be made in addition to the rate from
89 York; that said rate of 40 cents per 100 pounds and
pumping charge of 2 cents per 100 pounds, were the lawf
rates and the only lawful rates applicable on the shipment of pe
oil hereinafter described.

* * * * * * *

COUNT 24

And the Grand Jurors aforesaid, upon their oaths aforesaid,
further present:

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3. That throughout said period said common carriers had print
and had published and had filed with the Interstate Commerce Co
mission schedules of tariffs of rates and charges which showed
joint rate and charge of said carriers for the transportation of pe
oil, in carload lots, from said New York Harbor to said Jeffers
ville, over said through railway route, of 40 cents per 100 pound
that said schedules and tariffs providing said rate of 40 cents p
100 pounds further provided that said rate applied from poi
within free lighterage limits of said New York Harbor as provid
for and in accordance with certain tariffs and schedules of rul
regulations, and charges governing the acceptance and handling
freight at, and for all deliveries in, said New York Harbor, whi
said tariffs and schedules had been duly printed and had be
published and had been filed with the Interstate Commerce Commi
sion, by said Lehigh Valley Railroad Company; that said last me
tioned tariffs and schedules provided and defined free lighterage a
floatage limits in said New York Harbor to be:

North River:
New York side—Battery to 135th Street.
New Jersey side—National Storage Docks, Communipa
to and including Fort Lee, N. J.

90 East River and Harlem River:
New York side—Battery to Jerome Avenue Bridge, inclu
ing Harlem River side of Ward's and Randall's Islands.
Brooklyn side—From Pot Cove, Astoria, to and including
Newtown and Dutch Kills Creeks, and points in Wall
bout Canal, and to Hamilton Avenue Bridge, Gowan
Canal, and to and including 69th Street, South Brookly
(Bay Ridge).

New York Bay:
Points on north and east shore of Staten Island betwee
Bridge Creek (Arlington) and Clifton, both inclusive, and
including Shooter Island.
Points on the New Jersey shore of New York Bay and o
the Kill von Kull between Constable Hook and Avenue C
Bayonne City, opposite Port Richmond, S. I.;

d last mentioned tariffs and schedules further provided that
y therein specified as articles "not lighterage free", including
l, when loaded in tank cars, would be accorded free floatage
e in lots of six cars or over, or when loaded in less than six
ovided the total weight of shipments equaled or exceeded
pounds; that said last mentioned tariffs and schedules further
d that when such articles therein designated as "not light-
ree", including palm oil, in lots of 240,000 pounds, were
l in tank barges in lieu of tank cars on floats from alongside
ip and other points in said free lighterage and floatage limits
New York Harbor, the transfer from barges to tank cars
e at the expense of the shipper, for which service a charge
fter re-referred to as pumping charge of 2 cents per 100
would be made in addition to the rate from New York; that
e of 40 cents per 100 pounds and said pumping charge of 2
r 100 pounds, were the lawful rates and the only lawful rates
ble on the shipment of palm oil hereinafter described.

* * * * * *

COUNT 25

the Grand Jurors aforesaid, upon their oaths aforesaid, do
present:

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at throughout said period said common carriers had printed
d published and had filed with the Interstate Commerce Com-
schedules of tariffs of rates and charges which showed a joint
d charge of said carriers for the transportation of palm oil,
ad lots, from said New York Harbor to said Jeffersonville,
id through railway route, of 40 cents per 100 pounds; that
hedules and tariffs providing said rate of 40 cents per 100
further provided that said rate applied from points within
hterage limits of said New York Harbor as provided for and
rdance with certain tariffs and schedules of rules, regulations,
arges governing the acceptance and handling of freight at,
r all deliveries in, said New York Harbor, which said tariffs
edules had been duly printed and had been published and had
led with the Interstate Commerce Commission, by said The
re, Lackawanna and Western Railroad Company; that said
entioned tariffs and schedules provided and defined free light-
and floatage limits in said New York Harbor to be:

rth River:
New York side—Battery to 135th Street.
New Jersey side—National Storage Docks, Communipaw, to
and including Fort Lee, N. J.

East River and Harlem River:
New York side—Battery to Jerome Avenue Bridge, including Harlem river side of Ward's and Randall's Island
92 Brooklyn side—From Pot Cove, Astoria, to and including Newtown and Dutch Kills Creeks, and points in Wallabout Canal, and to Hamilton Avenue Bridge, Gowanus Canal and to and including 69th Street, South Brooklyn (Bay Ridge).
New York Bay:
Points on north and east shore of Staten Island between Bridge Creek (Arlington) and Clifton, both inclusive, and including Shooter Island.
Points on the New Jersey shore of New York Bay and on the Kill von Kull between Constable Hook and Avenue C, Bayonne City, opposite Port Richmond, S. I.;

that said last mentioned tariffs and schedules further provided that property therein specified as articles "not lighterage free," including palm oil, when loaded in tank cars, would be accorded free floatage privilege in lots of six cars or over, or when loaded in less than six cars, provided the total weight of shipments equaled or exceeded 240,000 pounds; that said last mentioned tariffs and schedules further provided that when such articles therein designated as "not lighterage free," including palm oil, in lots of 240,000 pounds, were handled in tank barges in lieu of tank cars on floats from alongside steamship and other points in said free lighterage and floatage limits in said New York Harbor, the transfer from barges to tank cars would be at the expense of the shipper, for which service a charge (hereinafter referred to as pumping charge) of 2 cents per 100 pounds would be made in addition to the rate from New York; that said rate of 40 cents per 100 pounds and said pumping charge of 2 cents per 100 pounds, were the lawful rates and the only lawful rates applicable on the shipment of palm oil hereinafter described.

* * * * * * *

93 In United States District Court, District of New Jersey

UNITED STATES OF AMERICA

vs.

MANHATTAN LIGHTERAGE CORPORATION

Motion to quash

Filed Jan. 15, 1937

Comes now the defendant, Manhattan Lighterage Corporation, by Frank M. Swacker, its attorney, and, upon leave of court, withdraws its plea of not guilty, heretofore interposed, and moves to quash the indictment herein and each and every count thereof, be-

se the same are insufficient in law to require the defendant to swer thereto, for the following reasons:

As shown by the annexed stipulation of the plaintiff, the charge entioned in the last half of the third paragraph of the first count the indictment, and thereafter and in each of the succeeding nts of said indictment, referred to as a pumping charge con- ined in the tariffs and schedules of the carriers mentioned in the dictment, is provided for by a rule reading as follows:

"Property loaded in tank cars will be accorded free floatage ivileges in lots of six cars or over, or when loaded in less than x cars provided the total weight of shipment exceeds or equals 0,000 pounds.

"When ordered by the shipper or consignee, in writing, and tank rges are available, Vegetable Oils, Foots, Settlings and Tank Bot- ms and Fish, Sea Animal, Whale Oils, Linseed Oil, and Molasses lots of 240,000 pounds or more, may be handled in tank barges lieu of tank cars on floats from or to alongside steamship and ints within free lighterage limits of New York Harbor. Transfer om barges to tank cars or from tank cars to barges to be at expense shipper or consignee, for which service a charge of 2 cents per 100 unds will be made in addition to the rates from or to New York."

That is, said pumping charge is applicable upon oils handled in nk barges only "when ordered by the shipper or consignee in iting"; and in no count of said indictment is it alleged that the handling of said oils in tank barges was ordered in writing by the shipper or consignee, and consequently each and every count of said indictment is bad for failure to allege cts constituting a crime.

Wherefore, this defendant respectfully prays that the said indict- ent and each and every count thereof be quashed and held for aught.

(Signed) Frank M. Swacker.
FRANK M. SWACKER,
Attorney for Defendant,
Manhattan Lighterage Corporation.

Dated Newark, N. J., April 3rd, 1935.

In United States District Court, District of New Jersey

[Title omitted.]

Stipulation

It is hereby stipulated by and between the United States of America, the plaintiff, and Manhattan Lighterage Corporation, the defendant, in the above-entitled action, that the charge mentioned in the last half of the third paragraph of the first count of the indict- ment, and thereafter and in each of the succeeding counts of said indictment, referred to as a pumping charge contained in the tariffs

and schedules of the carriers mentioned in the indictment, is provided for by a rule reading as follows:

"Property loaded in tank cars will be accorded free floatage privileges in lots of six cars or over, or when loaded in less than six cars provided the total weight of shipment exceeds or equals 240,000 pounds.

"When ordered by the shipper or consignee, in writing, and tank barges are available, Vegetable Oils, Foots, Settlings and Tank Bottoms and Fish, Sea Animal, Whale Oils, Linseed Oil, and Molasses in lots of 240,000 pounds or more, may be handled in tank barges in lieu of tank cars on floats from or to alongside steamship and points within free lighterage limits of New York Harbor. Transfer from barges to tank cars or from tank cars to barges to be at expense of shipper or consignee, for which service a charge of 2 cents per 100 pounds will be made in addition to the rates from or to New York."

UNITED STATES OF AMERICA,
Plaintiff.

By HARLAN BESSON,
United States Attorney.

MANHATTAN LIGHTERAGE CORPORATION,
Defendant.

By FRANK M. SWACKER,
Attorney for Defendant.

96 [File endorsement omitted.]

97 In United States District Court, District of New Jersey

UNITED STATES OF AMERICA

vs.

MANHATTAN LIGHTERAGE CORP.

Order quashing indictment

Filed March 16, 1937

It appearing that motions to quash the indictment have been filed in the above matter, which said motions raise the same points as were raised in a similar motion filed in United States vs. Durkee Famous Foods, Inc., No. 6821–b; and

It further appearing that a memorandum opinion has been filed in the last mentioned case and an order quashing the indictment in that case having been entered in accordance therewith.

Now, March 15, 1937, for the reasons set forth in the opinion filed in United States vs. Durkee Famous Foods, Inc., No. 6821–b, the indictment in this case be and it is hereby quashed.

(Signed) GUY L. FAKE, *Judge.*

97½ [File endorsement omitted.]

[Clerk's certificate to foregoing papers omitted in printing.]

In United States District Court, District of New Jersey

On Motion to Quash Indictment No. 6821-B

UNITED STATES OF AMERICA

vs.

DURKEE FAMOUS FOODS, INC., DEFENDANT

pearances: Harlan Besson, Esq., United States Attorney. Daniel ankel, Esq., Special Assistant United States Attorney. Burt neiker, Esq., Attorney for Interstate Commerce Commission, ed Roger Hinds, Esq., Attorney for Durkee Famous Foods, for the motion.

Memorandum

Filed Jan. 14, 1937

KE, District Judge:

e indictment here is intended to charge an offense against the sions of section 1 of the Elkins Act, Sec. 41, Title 49, U. S. C. A. gist of the issue before me resides in the allegation in the tment that the defendant "through a device aforesaid, unlaw- did knowingly solicit, accept and receive a concession and dis- nation in respect to interstate transportation of property * * * eby said property was transported by said common carriers at a ate than the published and applicable rate named in the tariffs shed and filed as aforesaid; contrary to the statute in such made and provided."

tion 41 of the Act makes it a criminal offense to "accept or re- any rebate concession, or discrimination in respect to transporta- of any property * * * whereby any such property shall by device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier."

The indictment discloses that the rate involved is 40 cents per hundred pounds and in addition thereto a charge of 2 cents 00 pounds, referred to as a pumping charge. The issue here is l entirely on the 2 cent pumping charge. On this point the in- ent reads as follows: "That said defendant did assume and b, for the benefit and advantage of said Durkee Famous Foods, aid pumping charge of 2 cents per 100 pounds."

is leads to an examination of the rule or tariff for the purpose of taining when and under what circumstances the 2 cent pumping e may become effective. By stipulation in writing between the s it is agreed that the item for pumping arises if at all under a ding as follows:

"Property loaded in tank cars will be accorded free floatage p... ileges in lots of six cars or over, or when loaded in less than six ... provided the total weight of shipment exceeds or equals 240... pounds.

"When ordered by the shipper or consignee, in writing, and ... barges are available, Vegetable Oils, Foots, Settlings and Tank B... toms and Fish, Sea Animal, Whale Oils, Linseed Oil, and Mola... in lots of 240,000 pounds or more, may be handled in tank bar... in lieu of tank cars on floats from or to alongside steamship ... points within free lighterage limits of New York Harbor. Tran... from barges to tank cars or from tank cars to barges to be at expe... of shipper or consignee, for which service a charge of 2 cents p... 100 pounds will be made in addition to the rates from or to N... York."

It should be noted that while the indictment is found under t... Elkins Act, the crime involved is not fully defined in that Act. W... are compelled to look elsewhere for the factors which lead to a co... plete definition. We find these factors in the filed tariff (rule) a... for present purposes they have the same force and effe...
101 statutory provisions. Looking then to the tariff, it will ... seen, among other things, that the 2 cent charge does not bec... effective unless tank barges are "* * * ordered by the shipp... or consignee, in writing and tank barges are available, * * ... These requirements are conditions precedent to the right to bill ... assess the 2 cent charge. It, therefore, follows that no criminal co... cession or discrimination can be spelled out under the Elkins A... when read with the tariff unless these essential conditions are m... in the language of the indictment. The indictment is silent on th... subject; therefore it charges no crime and the motion to quash ma... be granted.

See United States v. Cook, 84 U. S. 186; Davis v. Henderson, 2... U. S. 92; U. S. v. Olds Motor Works, 4 Fed. Supp. 65, and Unit... States v. Wood, 159 Fed. 187.

102 [File endorsement omitted.]

103 In United States District Court, District of New Jersey

On Motion to Quash Indictment No. 6821–B

UNITED STATES OF AMERICA

vs.

DURKEE FAMOUS FOODS, INC., DEFENDANT

Appearances: Harlan Besson, Esq., United States Attorney. Dan... H. Kunkel, Esq., Special Assistant United States Attorney. Burt L... Smelker, Esq., Attorney for Interstate Commerce Commissi...

Roger Hinds, Esq., Attorney for Durkee Famous Foods, Inc., Motion.

ndum correcting and amending a memorandum filed in this cause on January 14, 1937

Filed Jan. 25, 1937

District Judge:

nemorandum filed by me in the above entitled cause on the y of January, 1937, is hereby corrected and amended as fol-

trike out the paragraph on page 2 of the aforesaid memo- which reads as follows:

indictment discloses that the rate involved is 40 cents per l pounds and in addition thereto a charge of 2 cents per 100 referred to as a pumping charge. The issue here is based on the 2 cent pumping charge. On this point the indictment s follows: 'That said defendant did assume and absorb, for efit and advantage of said Durkee Famous Foods, Inc., said g charge of 2 cents per 100 pounds.'"

ert in lieu thereof the following paragraph:

ndictment discloses that the rate involved is 40 cents per hun- ounds and in addition thereto a charge of 2 cents per 100 referred to as a pumping charge. The issue here is based on the 2 cent pumping charge. On this point the indictment s follows: "That said Manhattan Lighterage Company did and absorb, for the advantage of said defendant, said pump- ng charge of 2 cents per 100 pounds."

[File endorsement omitted.]

[Clerk's certificate to foregoing papers omitted in printing.]

Supreme Court of the United States

Stipulation re enlargement of record, etc.

tion of defendant-appellee to enlarge the record in this mat- adding thereto—

morandum opinion of the United States District Court filed 14, 1937, supporting the order referred to in the plea in l answer herein quashing the previous indictment herein al No. 6828-b).

rrecting memorandum opinion of said United States District led January 25, 1937, correcting the above mentioned opinion al No. 6828-b).

tion, including stipulation annexed thereto, to quash said s indictment, filed on or about April 3, 1935 (Criminal No. referred to in the plea in bar and answer herein.

4. Prior indictment herein in said United States District C returned and filed at the April 1934 term of said District C (Criminal No. 6828–b);

having been granted by the Court without objection of the Solic General, it is hereby

Stipulated that, in so far as the said prior indictment is concer only the following parts need be printed:

(a) The first count in full;
(b) Paragraph "1" of Counts 2 to 5, inclusive;
(c) Paragraph "3" of Count 6;
(d) Paragraph "1" of Counts 7 to 10, inclusive;
(e) Paragraph "3" of Count 11;
(f) Paragraph "1" of Counts 12 to 15, inclusive;
107 (g) Paragraph "3" of Count 16;
(h) Paragraph "1" of Counts 17 to 20, inclusive;
(i) Paragraph "3" of Count 21;
(j) Paragraph "1" of Count 22;
(k) Paragraph "3" of Counts 23, 24, and 25.

And it is stipulated that the s. ' first count is typical of all of t twenty-five counts of said prior indictment.

Further stipulated, that the order of court in 6828–B made by D trict Judge Fake and filed on or about March 15, 1937, quashing indictment in this case for the reasons set forth in the opinion in 6821- b, shall also be printed in the record in this appeal.

Dated November 28, 1938.

ROBERT H. JACKSON,
Solicitor General of the United States.
FRANK M. SWACKER,
Counsel for Appellee.
Manhattan Lighterage Corporation.

108 In Supreme Court of the United States

Statement of points and designation of record to be printed

Filed Aug. 30, 1938

I

United States of America, appellant, states that in its brief o oral argument on its appeal in the above entitled cause it will r upon the points stated in its assignment of errors therein.

II

The entire record in this cause as filed in this Court is nece for consideration of the points stated by appellant, and the en

anscript of record as transmitted by the Clerk of the District Court hould be printed by the Clerk of this Court.

Robert H. Jackson,
ROBERT H. JACKSON,
Solicitor General.

August —, 1938.

Service of a copy of the above Statement of Points and Designation of Record to be Printed acknowledged August 24, 1938.

FRANK M. SWACKER,
Counsel for Appellee.

[File endorsement omitted.]

[Endorsement on cover:] Enter: Attorney General. File No. 2,795. New Jersey D. C. U. S. Term No. 310. The United States of America, Appellant, vs. Manhattan Lighterage Corporation. Filed August 30, 1938. Term No. 310 O. T. 1938.

U. S. GOVERNMENT PRINTING OFFICE 1938

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AUG 30 1938
CHARLES ELMORE CROPLEY
CLERK

No. 310

In the Supreme Court of the United States

OCTOBER TERM, 1938

THE UNITED STATES OF AMERICA, APPELLANT

v.

MANHATTAN LIGHTERAGE CORPORATION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

STATEMENT AS TO JURISDICTION

In the District Court of the United States for the District of New Jersey

CRIMINAL No. 7919–B

UNITED STATES OF AMERICA, PLAINTIFF

v.

MANHATTAN LIGHTERAGE CORPORATION, A CORPORATION, DEFENDANT

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, United States of America submits herewith its statement showing the basis of jurisdiction of the Supreme Court of the United States to entertain an appeal in this cause.

A. The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment complained of is conferred by Title 18, Section 682, of the United States Code, otherwise known as the Criminal Appeals Act, and by Section 345, Title 28, of the United States Code.

B. The statute of the United States, the construction of which is involved herein is the Act of

May 10, 1934, c. 278, 48 Stat. 772 (U. S. C. T
18, Sec. 587) which provides so far as pertin

> Whenever an indictment is found d
> tive or insufficient for any cause, after
> period prescribed by the applicable st
> of limitations has expired, a new indict
> may be returned at any time during
> next succeeding term of court follo
> such finding, during which a grand
> thereof shall be in session.

C. The judgment of the District Court soug
be reviewed was entered on June 28, 1938.
application for appeal was filed on July —, 1
and the appeal was allowed on July —, 1938.

D. The indictment is in eleven separate co
each of which is based on Section 1 of the El
Act, U. S. C. Title 49, Sec. 41 (1), and alleges
on a specified date the defendant knowingly gra
and gave a concession of 2 cents per 100 pound
respect of the interstate transportation of veget
oil by certain specified common carriers by
road, whereby the oil was transported at a less
than that named in the carriers' published ta
The first five offenses are alleged to have been
mitted in August 1932, the second five in A
1933, and the last in September 1932.

A prior indictment charging the same offe
had been returned at the April term of Cou
1934, to which a motion to quash was filed in A
1935, and sustained by judgment entered Marc

1937, during the January, 1937, term of Court.[1] At the same term the Government (invoking the Act of May 10, 1934, U. S. C. Title 18, Sec. 587), represented the case on March 16, 1937, to the grand jury empaneled for and in session during the January term at Trenton, New Jersey, and the grand jury returned the new indictment on April 9, 1937, at that term. The next succeeding term of court for the District of New Jersey was fixed by law to be held beginning April 6, 1937 (the first Tuesday in April), at Newark, New Jersey (U. S. C. Title 28, Sec. 176).

To this new indictment of April 9, 1937, the defendant filed on June 18, 1937, a pleading designated as a "Plea in Bar," alleging (1) that as the offenses charged were committed more than three years preceding the return of the indictment, prosecution was barred by the statute of limitations (U. S. C. Title 18, Sec. 582); (2) that the new indictment was not returned in conformity with the Act of May 10, 1934 (U. S. C. Title 18, Sec. 587), because it was returned at the same term and not at the term next succeeding the term at which the prior indictment was found defective; and (3)

[1] Thus, almost three years had passed between the return of the prior indictment and the date on which it was quashed, and approximately four years between the commission of the offenses and the quashing of the indictment. But for Act of May 10, 1934 (U. S. C. Title 18, Sec. 587), the statute of limitations (U. S. C. Title 18, Sec. 582) would have barred re-indictment.

that the order quashing the prior indictment was appealable under the Criminal Appeals Act (U. S. C. Title 18, Sec. 682) and that, therefore, the Act of May 10, 1934, had no application to that order. The pleading concludes with the following:

> All of which said defendant, Manhattan Lighterage Corporation, is ready and willing to verify, and therefore pleads the same in bar of any prosecution or punishment under said indictment or any count thereof, and says that to prosecute or punish it thereunder for any of the alleged offenses charged therein is contrary to the provisions of the statute of limitations, 18 U. S. Code, section 582.
>
> WHEREFORE, the defendant prays judgment that the said alleged indictment be not further prosecuted against it, and that by this court it may be dismissed and discharged from the said premises without day and the said alleged indictment be held for naught and quashed.

On June 28, 1938, the court entered judgment ordering,

> that the said Plea in Bar to said indictment be and the same is hereby sustained, and that said indictment be not further prosecuted against said defendant, and that said indictment be and the same is hereby accordingly dismissed, discharged, held for naught and quashed.

Construing the Act of May 10, 1934, the court's opinion holds that the language of the Act,

> leads to the inescapable conclusion that where an indictment has been found to be defective after the passage of the prescribed period of limitation, the one and only Grand Jury which can hand down a new indictment is that Grand Jury which is authorized to act at the term next succeeding the term at which the Court found the indictment to be defective; and it appearing, as it does here, that the indictments under review were not found by a Grand Jury authorized as aforesaid, the indictments must necessarily fall.

On the date this judgment was entered the "term next succeeding the term at which the Court found the (prior) indictment to be defective" had of course expired.

Although the Criminal Appeals Act provides for a direct appeal to the Supreme Court "From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy," the application of that provision to the judgment in this case is not entirely clear, (1) because it is uncertain whether the pleading sustained by the judgment is "a special plea in bar," the prayer thereof being, among other things, that the indictment be "held for naught and quashed," and the judgment being not only that the "Plea in Bar" be sustained but also that the indictment be "dismissed, discharged, held for naught and quashed," and (2) the ruling of the court is not of such nature as forever to bar prosecution of the

offenses, but, instead, recognizes the right of t
Government to prosecute further at the term
court next succeeding the term at which the Co
found the prior indictment to be defective. (Co
pare *United States* v. *Thompson,* 251 U. S. 4
412; *United States* v. *Storrs,* 272 U. S. 652.)

The right to appeal, however, is clear, we thi
under the language of the Act which provides
an appeal "From a decision or judgment quashi
setting aside, or sustaining a demurrer to, any
dictment, or any count thereof, where such decisi
or judgment is based upon the invalidity or c
struction of the statute upon which the indictm
is founded."

It is true that the statute here constru
(U. S. C. Title 18, Sec. 587) is not the statute wh
prescribed the substantive offenses charged in
indictment. However, Section 587 must be
garded as being as much a part of the statute (
Elkins Act) prescribing the offenses as if it w
expressly written into the latter Act, because,
for that Section, the Government would have h
no right whatever to seek the new indictme
Therefore, Section 587 would necessarily appear
be a part of the statute upon which the indictm
is founded, and it would do no violence to langua
to so consider it.

If the Elkins Act, which prescribed the offen
charged, had contained in its own language a d
nite statute of limitations but had also direct
that the limitation should be suspended under c

tain circumstances, which is the only effect of Section 587, there clearly could be no question but that a decision or judgment holding that the suspension of the limitation provision did not apply in certain circumstances would be a "decision or judgment * * * based upon the * * * construction of the statute upon which the indictment is founded."

E. The question presented is substantial. Section 587 is a statute of general application which was enacted for the purpose of circumventing the efforts of defendants to delay prosecution through resort to dilatory motions until the statute of limitations had barred re-indictment. (Report of Judiciary Committee, Congressional Document 9769, Senate Report 405, 73d Cong., 1st Sess.) The construction of the Act by the District Court interposes an interim of wholly unnecessary and illogical delay in the re-indictment of defendants under this Act, during which interim prosecution would become more difficult through the disappearance or death of witnesses, the vanishing of evidence, and the staleness of the crime, which always result from the passage of time. It is clearly of public importance that after an indictment is quashed the Government be permitted to seek a new indictment at the earliest possible opportunity consistent with the availability of a grand jury. There are no other court decisions on the question here presented, and it is highly important in the enforce-

ment of Federal criminal statutes generally, that the question be settled by the Supreme Court.

F. If the judgment of the District Court be regarded as one sustaining a special plea in bar, the following decisions support the jurisdiction of the Supreme Court:

United States v. *Celestine*, 215 U. S. 278; *United States* v. *Barber*, 219 U. S. 72; *United States* v. *Oppenheimer*, 242 U. S. 85; *United States* v. *Thompson*, 251 U. S. 407.

If the judgment of the District Court quashing and setting aside the indictment was based upon that Court's construction of the statute upon which the indictment was founded, the following decisions sustain the jurisdiction of the Supreme Court:

United States v. *Keitel*, 211 U. S. 370; *United States* v. *Sprague*, 282 U. S. 716; *United States* v. *Hastings*, 296 U. S. 188; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304.

A copy of the opinion of the District Court is appended hereto.

Respectfully submitted.

N. A. TOWNSEND,
Acting Solicitor General.

JOHN J. QUINN,
United States Attorney.

JULY 1938.

In the District Court of the United States for the District of New Jersey

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CRIMINAL No. 7918b

UNITED STATES OF AMERICA

v.

DURKEE FAMOUS FOODS, INC.

CRIMINAL No. 7919b

UNITED STATES OF AMERICA

v.

MANHATTAN LIGHTERAGE CORPORATION

CRIMINAL No. 7920b

UNITED STATES OF AMERICA

v.

COLGATE-PALMOLIVE-PEET COMPANY

(On defendants' pleas in bar to indictments.)

Newark, N. J., Tuesday, June 14, 1938

Before Hon. GUY L. FAKE, U. S. D. J.

Appearances: Daniel H. Kunkel, Esq., Special Assistant to the United States Attorney, for the Government. Roger Hinds, Esq., for defendant

Durkee Famous Foods, Inc. Frank M. Swacker, Esq., for defendant Manhattan Lighterage Corporation. Messrs. Wall, Haight, Carey & Hartpence, by John A. Hartpence, Esq., and Alfred F. Conway, Esq., for defendant Colgate-Palmolive-Peet Company.

W. W. HEIRONIMUS,
Official Reporter.

The COURT (orally, at close of argument): The issues here arise on three indictments, to each of which pleas in bar have been filed. This memorandum will be dispositive of the three cases.

The defendants were indicted on the 9th of April, 1937, for alleged violations of the Elkins Act, Title 49, Section 41.

The acts complained of in the indictments having been committed, according to the dates set forth therein, more than three years prior to the filing of the indictments, Section 582 of Title 18 of the U. S. Code provides as follows:

> No person shall be prosecuted, tried or punished for any offense, not capital, except as provided in Section 584 of this Title, unless the indictment is found or action is instituted within three years next after such offense shall have been committed.

It is contended for the Government that the pleas should not be sustained because Section 587 of Title 18 of the U. S. Code provides as follows:

> Whenever an indictment is found defective or insufficient for any cause after the

> period prescribed and the applicable Statute of Limitations has expired, a new indictment may be returned at any time during the next succeeding term of Court following such finding, during which the Grand Jury thereof shall be in session.

It is urged that a reasonable and proper consideration of this section causes it to become effective as to the then existing term of Court, notwithstanding the fact that the statute itself is silent as to the then existing term. (Citing Endlich on Interpretation of Statutes, pages 599 etc., *U. S.* v. *N. Y. Central Railroad,* 212 U. S. 509; *U. S.* v. *Koenig Coal Co.,* 270 U. S. 512; *U. S.* v. *Baltimore Post Co.,* 2 Fed (2d) 761, affirmed 268 U. S. 388; *Ozawa* v. *U. S.,* 260 U. S. 178.)

Counsel for the defendants argue that to so construe the statute would cause the Court to enter the sphere of the legislature and in effect amend the Act to read as follows:

> A new indictment may be returned at any time during the next succeeding term of court, following such finding, during which the Grand Jury thereof shall be in session and *as well at the Term in which the indictment is found defective.*

Moreover, it is urged that Section 587 must be strictly construed because it is an exception to the Statute of Limitations.

Other arguments are offered by counsel for the defense, which appear in defendants' briefs. They

cite the following cases to sustain their position: *U. S.* v. *Sheldon,* 2 Wheaton 119–121 and 122; *U. S.* v. *McElvaine,* 272 U. S. 633 at 639; *U. S.* v. *Scherton,* 285 U. S. 518 at 521–2; 16 Corpus Juris 228, Section 350.

The indictments were returned by a Grand Jury sitting for the January Term of Court on April 9, 1937, but within the time fixed by law for the April Term of Court at Newark, the January Term having been extended by an order of the Court.

At the time the previous indictments were quashed by this Court, the three-year Statute of Limitations had then run against the alleged offenses.

Newark, N. J. Monday, June 27, 1938

(Hearing continued from June 14, 1938. Same appearances.)

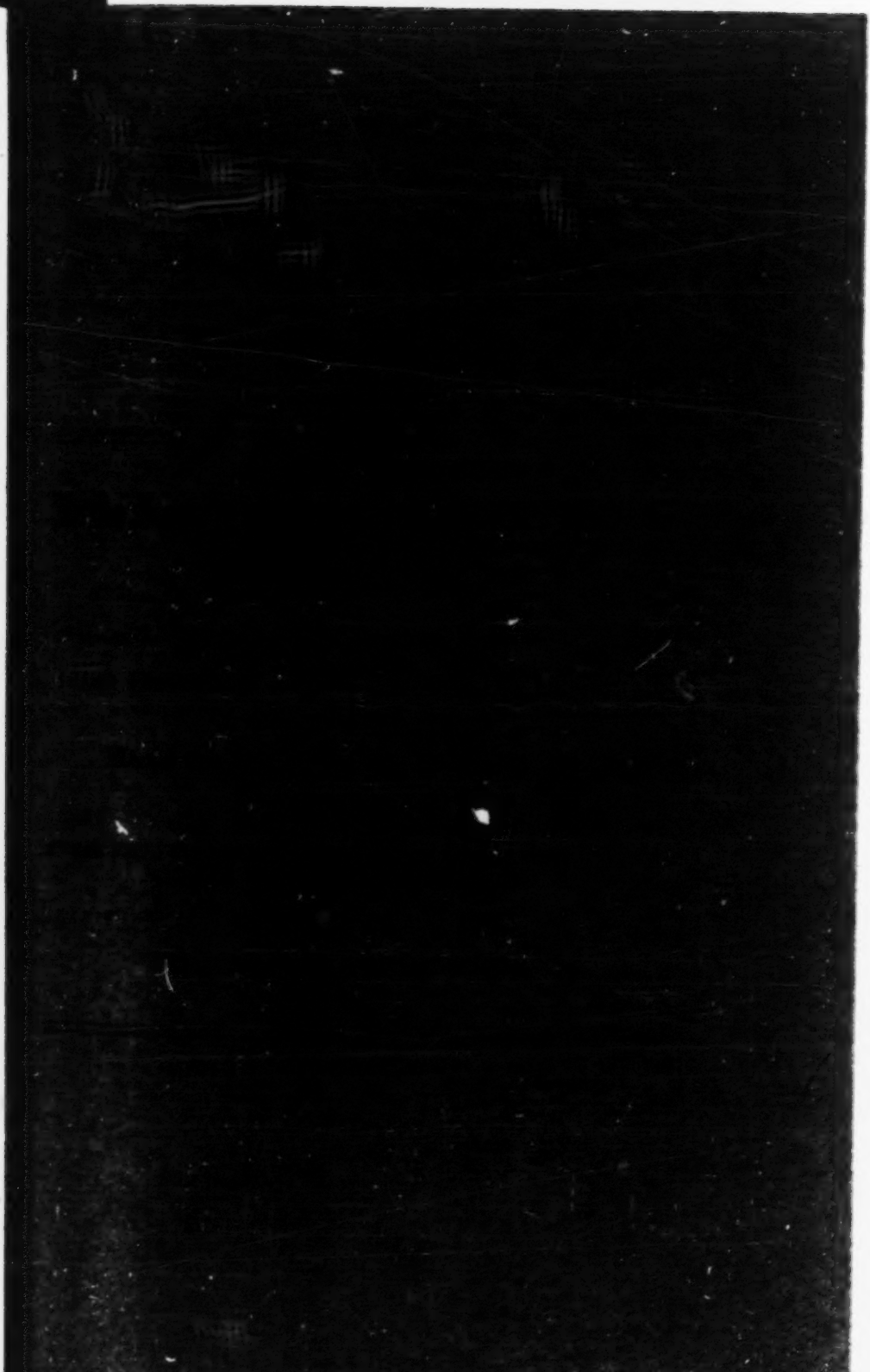
The COURT (orally, at close of argument): At the last session, I stated the facts and raised the issues upon which counsel have appeared before me today. Both sides have been diligent in their endeavors to assist the Court in ascertaining the law to be followed here. No cases have been discovered bearing upon a construction of the section of the Statute of Limitations which is here involved. This has resulted in much research in an endeavor to find an analogous situation, and upon careful consideration of the arguments presented by counsel, as well as a consideration of the cases they have cited, it is my conclusion that the Court

being without power to amend the statute involved, and it appearing that the statute itself contains no ambiguity, either patent or latent, must give to the statute the generally accepted meaning of the language used therein. This leads to the inescapable conclusion that where an indictment has been found to be defective after the passage of the prescribed period of limitation, the one and only Grand Jury which can hand down a new indictment is that Grand Jury which is authorized to act at the term next succeeding the term at which the Court found the indictment to be defective; and it appearing, as it does here, that the indictments under review were not found by a Grand Jury authorized as aforesaid, the indictments must necessarily fall.

The pleas in bar are therefore sustained.

United States District Court District of New Jersey. United States of America, Plaintiff v. Manhattan Lighterage Corporation, a corporation, Defendant. Criminal No. 7919–b. Statement as to Jurisdiction. John J. Quinn, United States Attorney. Filed July 25, 1938. At 11 o'clock A. M. Benjamin F. Hawkins, Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1938



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CITATIONS

United States of America, Appellant v. *Durkee Famous Foods, Inc.*, No. 309, October Term, 1938	2, 8

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 310

THE UNITED STATES OF AMERICA, APPELLANT

v.

MANHATTAN LIGHTERAGE CORPORATION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 27) has not been reported.

JURISDICTION

The order of the District Court sustaining the plea in bar and dismissing, discharging, and quashing the indictment was entered June 28, 1938 (R. 29). The appeal to this Court was applied for and allowed on July 25, 1938 (R. 32). The jurisdiction of this Court is conferred by the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246

(U. S. C., Title 18, Sec. 682), and by Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C., Title 28, Sec. 345). An order was entered by this Court on October 10, 1938, noting probable jurisdiction.

QUESTIONS PRESENTED

1. Whether Section 1 of the Act of May 10, 1934, which limits the operation of statutes of limitations and authorizes a new indictment where a prior indictment has been found defective or insufficient for any cause after the period of limitation provided by the applicable statute has expired, permits the new indictment to be returned at the same term of court during which the prior indictment is found defective.

2. Whether the application of the Act, in authorizing new indictments in the specified cases whenever prior indictments are found defective or insufficient "for any cause" is conditioned upon or affected by the nature of the ground upon which the prior indictment is quashed.

STATUTES INVOLVED

The statutes involved are printed in the Appendix to the Government's brief in *United States of America, Appellant* v. *Durkee Famous Foods, Inc.*, No. 309, October Term, 1938, wherein the identical questions here involved are discussed.

STATEMENT

On April 9, 1937, the grand jury empaneled for and in session during the January 1937 term of the

United States District Court for the District of New Jersey indicted the appellee in eleven counts charging violations of the Elkins Act (U. S. C., Title 49, Sec. 41(1)). Each count of the indictment (R. 1) alleges that under the following circumstances the appellee during August or October 1932, or April 1933, unlawfully and knowingly granted and gave to Durkee Famous Foods, Inc., or Colgate-Palmolive-Peet Company (hereinafter called the shipper), a concession of 2 cents per 100 pounds in respect of the interstate transportation by certain railroad common carriers of a shipment of palm oil, whereby the oil was transported by the railroads at a less rate and charge than that named in their published schedules and tariffs.

The railroads published in their tariffs a line-haul rate of 40 cents per 100 pounds for the transportation of vegetable oils, including palm oil, from alongside steamships or vessels within the free lighterage or floatage limits of New York Harbor, N. Y., to Chicago, Illinois, and Jeffersonville, Indiana. Their tariffs provided, in connection with the acceptance and handling of shipments to be transported at that rate, that property loaded in tank cars would receive free floatage within the Harbor when loaded in lots of six or more tank cars, or in less than six cars, if the total weight of the entire shipment was 240,000 pounds or more. The tariffs also provided that shipments of palm oil in lots of 240,000 pounds or more would be handled across the Harbor in tank barges in lieu of tank

cars on floats when the barges were ordered by the shipper or consignee, "in writing," and were available, and that when tank barges were so used, the service of pumping and transferring the oil from the barges to tank cars would be at the expense of the shipper, for which service a charge of 2 cents per 100 pounds would be made against the shipper in addition to the 40-cent line-haul rate (R. 1-2).

The shipper named in each count of the indictment ordered, "in writing," from the railroad company tank barges, in lieu of tank cars on floats, for the transfer of the shipments of imported palm oil from alongside steamships or vessels anchored in New York Harbor [and within the free lighterage and floatage limits of the Harbor], to the terminal of the railroad company in New Jersey, and tendered the shipments to the railroad for transportation from the steamship to Chicago, Illinois, or Jeffersonville, Indiana. The railroad accepted the shipments and, through its agent, Manhattan Lighterage Company, appellee herein, conveyed the shipments by tank barge from the steamship to the terminal in New Jersey where the appellee pumped or transferred the oil from the barges to tank cars, and whence the railroads transported the shipments to Chicago, Illinois, or Jeffersonville, Indiana. The shipper paid to the railroads *only* the line-haul rate of 40 cents per hundred pounds. Appellee paid the railroads the 2-cent pumping charge. Pursuant to a previous secret arrangement between the shipper

and the appellee, the shipper never paid any part of the tariff charge for the pumping service to the railroads or to the appellee, and, by that device, appellee granted and gave to the shipper the alleged concession of 2 cents per 100 pounds from the published tariff rate (R. 3).

A prior indictment based upon these facts and charging the same offenses had been returned at the April term of court in 1934 (R. 34). A motion to quash (R. 50) that indictment was sustained by opinion filed January 14, 1937, and judgment entered March 16, 1937, during the January 1937 term of court. That indictment was quashed on the ground that it failed to allege the fact that the shippers' requests upon the railroad for tank barges were made "in writing" as required by the tariff rule, which had been laid before the court by stipulation (R. 51).

At the same term of court the Government, invoking the Act of May 10, 1934, re-presented the case to the grand jury empaneled for and in session during the January term, 1937, at Trenton, and that grand jury returned the new indictment on April 9, 1937, the January 1937 term having been extended by order of the court (R. 29). The new indictment in eleven counts contains the allegation that the shippers' orders for tank barges were made "in writing," thus curing the defect which the court found in the prior indictment (R. 3).

To this new indictment of April 9, 1937, the appellee filed on June 18, 1937, a pleading designated as a "Plea in Bar," alleging (1) that as the offenses charged were committed more than three years preceding the return of the indictment, prosecution was barred by the statute of limitations (U. S. C., Title 18, Sec. 582); (2) that the indictment was not returned in conformity with the Act of May 10, 1934, because it was returned at the same term and not at the term next succeeding the term at which the prior indictment was found defective; and (3) that the order quashing the prior indictment was appealable under the Criminal Appeals Act and that, therefore, the Act of May 10, 1934, had no application to that order (R. 23–24).

On June 28, 1938, the court entered judgment (R. 29) ordering—

> that the said Plea in Bar to said indictment herein be and the same is hereby sustained, and that said indictment be not further prosecuted against said defendant, and that said indictment be and the same is hereby accordingly dismissed, discharged, held for nought and quashed.

Construing the Act of May 10, 1934, the court's opinion (R. 28) held that the language of the Act—

> leads to the inescapable conclusion that where an indictment has been found to be defective after the passage of the prescribed period of limitation, the one and only Grand Jury which can hand down a new indictment

is that Grand Jury which is authorized to act at the term next succeeding the term at which the Court found the indictment to be defective; and it appearing, as it does here, that the indictments under review were not found by a Grand Jury authorized as aforesaid, the indictments must necessarily fall.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In sustaining the plea in bar.

2. In holding and adjudging that the statute of limitations had barred the prosecution of the offenses alleged in the several counts of the indictment.

3. In holding and adjudging that the Act of May 10, 1934 (U. S. C., Title 18, Sec. 587), did not limit the application of the statute of limitations (U. S. C., Title 18, Sec. 582) so as to permit the new indictment to be returned by the grand jury empaneled at and in session during the same term of court at which the prior indictment was found defective and insufficient.

4. In holding and adjudging that the Act of May 10, 1934 (U. S. C., Title 18, Sec. 587), was effective to stay the statute of limitations only where the new indictment is returned by a grand jury in session during the next succeeding term of court following the term at which the prior indictment was found defective or insufficient.

5. In entering the order of June 28, 1938, sustaining the plea in bar and dismissing and quashing the indictment.

DISCUSSION

As this case presents the identical questions which are involved in the case of *United States of America, Appellant* v. *Durkee Famous Foods, Inc.*, No. 309, October Term, 1938, the Court is respectfully referred to the Government's brief in the *Durkee* case for a discussion of the Government's contentions.

CONCLUSION

For the reasons stated in the Government's brief in the *Durkee* case, it is respectfully submitted that the judgment of the court below sustaining the plea in bar to the indictment in this case should be reversed.

ROBERT H. JACKSON,
Solicitor General.
THURMAN ARNOLD,
Assistant Attorney General.
ELMER B. COLLINS,
Special Assistant to the Attorney General.
W. MARVIN SMITH,
Attorney.
DANIEL H. KUNKEL,
Attorney, Interstate Commerce Commission.
DECEMBER 1938.

U. S. GOVERNMENT PRINTING OFFICE

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No. 310

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

THE UNITED STATES OF AMERICA,
Appellant,

v.

MANHATTAN LIGHTERAGE CORPORATION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

BRIEF FOR MANHATTAN LIGHTERAGE CORPORATION

FRANK M. SWACKER,
Counsel for Appellee.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1938

No. 310.

THE UNITED STATES OF AMERICA, *Appellant*,

v.

MANHATTAN LIGHTERAGE CORPORATION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

REPLY BRIEF FOR MANHATTAN LIGHTERAGE CORPORATION.

The issues in this case are the same as those involved in *No. 309, United States of America, Appellant*, v. *Durkee Famous Foods, Inc.*, and *No. 311, United States of America, Appellant*, v. *Colgate-Palmolive-Peet Company.*

Counsel for the three appellees have collaborated in a brief in reply to that of the Solicitor General which has been filed in *No. 309.* Accordingly, to avoid reprinting, leave is respectfully asked of the Court to refer to the appellee's brief in *No. 309* as an answer to the Solicitor General's brief herein.

Respectfully submitted,

FRANK M. SWACKER,
Counsel for Appellee.

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Supreme Court of the United States

OCTOBER TERM—1938

No. 310

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

MANHATTAN LIGHTERAGE CORPORATION,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

MOTION TO ENLARGE RECORD.

FRANK M. SWACKER,
Counsel for Appellee.

Supreme Court of the United States,

OCTOBER TERM—1938.

No. 310.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

MANHATTAN LIGHTERAGE CORPORATION,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

MOTION TO ENLARGE RECORD.

Now comes Manhattan Lighterage Corporation, defendant in this cause in the United States District Court for the District of New Jersey, which is now pending in this Court on appeal by the above-named Appellant, and respectfully moves that this Honorable Court make its order to enlarge the record herein in the respects hereinbelow specified, and if necessary to that end to issue its writ of certiorari commanding the said District Court to certify and send to this Court a proper and complete transcript of the records so hereinbelow specified.

The aforesaid additional records are as follows:

1. Memorandum opinion of the United States District Court filed January 14, 1937, supporting the order referred to in the plea in bar and answer herein quashing the previous indictment herein (Criminal No. 6828-b).

2. Correcting memorandum opinion of said United States District Court filed January 25, 1937, correcting the above mentioned opinion (Criminal No. 6828-b).

3. Motion, including stipulation annexed thereto, to quash said previous indictment, filed on or about April 3, 1935 (Criminal No. 6828-b) referred to in the plea in bar and answer herein.

4. Prior indictment herein in said United States District Court returned and filed at the April 1934 term of said District Court (Criminal No. 6828-b), though Appellee is ready to stipulate that only paragraph 4 of Count 1, paragraph 1 of Counts 2 to 5 inclusive, paragraph 3 of Count 6, and paragraph 1 of Counts 7 to 15, inclusive, of said prior indictment be included in the printed record in this Court.

The following are the reasons and grounds upon which Appellee bases this motion:

1. Without the aforesaid records this Court cannot fully and intelligently consider and determine one of the principal contentions relied upon by appellee upon its plea in bar in the District Court, i. e. whether the prior indictment was quashed because it was "found defective or insufficient" and, therefore, whether the indictment herein is saved from the bar of the three-year statute of limitations (18 U. S. Code Sec. 582) by the saving statute, Title 18 U. S. Code Sec. 587 (May 10, 1934 c. 278, Sec. 1, 48 Stat. 772) providing as follows:

> "Whenever an indictment (prior indictment) is found *defective* or *insufficient* for any cause, after the period prescribed by the applicable statute of limitations has expired, a *new* indictment may be returned at any time during the next succeeding term of court following such finding, during which a grand jury thereof shall be in session" (The words in parenthesis and italics ours).

In order to determine whether or not the prior indictment was "found defective or insufficient" (within the meaning of said saving statute) and hence whether said saving statute applies, it is necessary to examine and consider the above mentioned records, i. e. the opinion supporting the order quashing said prior indictment, the motion and factual stipulation on which said order was based, and so much of said prior indictment as is material to said inquiry.

Defendant-Appellee urged in said District Court herein upon said plea in bar, and will urge in this Court, that said prior indictment was quashed because it appeared by stipulation on the motion to quash that the tariff (which was alleged to have been rebated) contained a vital condition precedent which the prior indictment failed to allege and, therefore, was in a vital respect different from the tariff as alleged in the indictment, so that the ground for quashing said indictment was not that the indictment was "found defective or insufficient" within the meaning of said saving statute, but rather that the Court found that the allegation of the indictment was not supported by the stipulated facts, so that the quashing and dismissal was upon the factual merits rather than for mere insufficiency or defect in form of pleading.

While the District Court did not expressly accept or reject this contention, but, instead, apparently based its order quashing the new indictment solely on the ground that it was returned at the *same* term of court instead of the term next succeeding the term at which the prior indictment was quashed, nevertheless, the contention involves the construction of the Act of May 10, 1934, on which the new indictment is based and should be considered and decided by this Court.

2. The plea in bar herein contains an allegation as to the aforesaid opinion quashing said prior indictment, and the basis therefor, which allegation is denied in the answer of the United States to said plea in bar, and it is necessary

that this Court examine and consider said opinion on said prior indictment, as well as the said motion, stipulation, and prior indictment itself, in order to determine whether or not, for the reason stated above, said saving statute exonerates the present indictment from the bar of the statute of limitations.

3. The Solicitor General has indicated that, though he does not agree with the contentions of the Appellee, he has no objection to the granting of this motion to enlarge the record.

4. Appellee's excuse for delay in thus moving to enlarge the record is that this is one of three cases involving the same question, and counsel for Durkee Famous Foods, Inc., defendant in one of the others, who contemporaneously is filing a like motion, has had up for all three parties with the Solicitor General the matter of enlarging the record. In the meantime the transcript of the record had already been filed in this Court, and it has been suggested that the proper procedure, under the circumstances, is to move to enlarge the record as aforesaid, and for such writ as may be requisite thereto.

Respectfully submitted,

FRANK M. SWACKER,
Counsel for Appellee.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 311

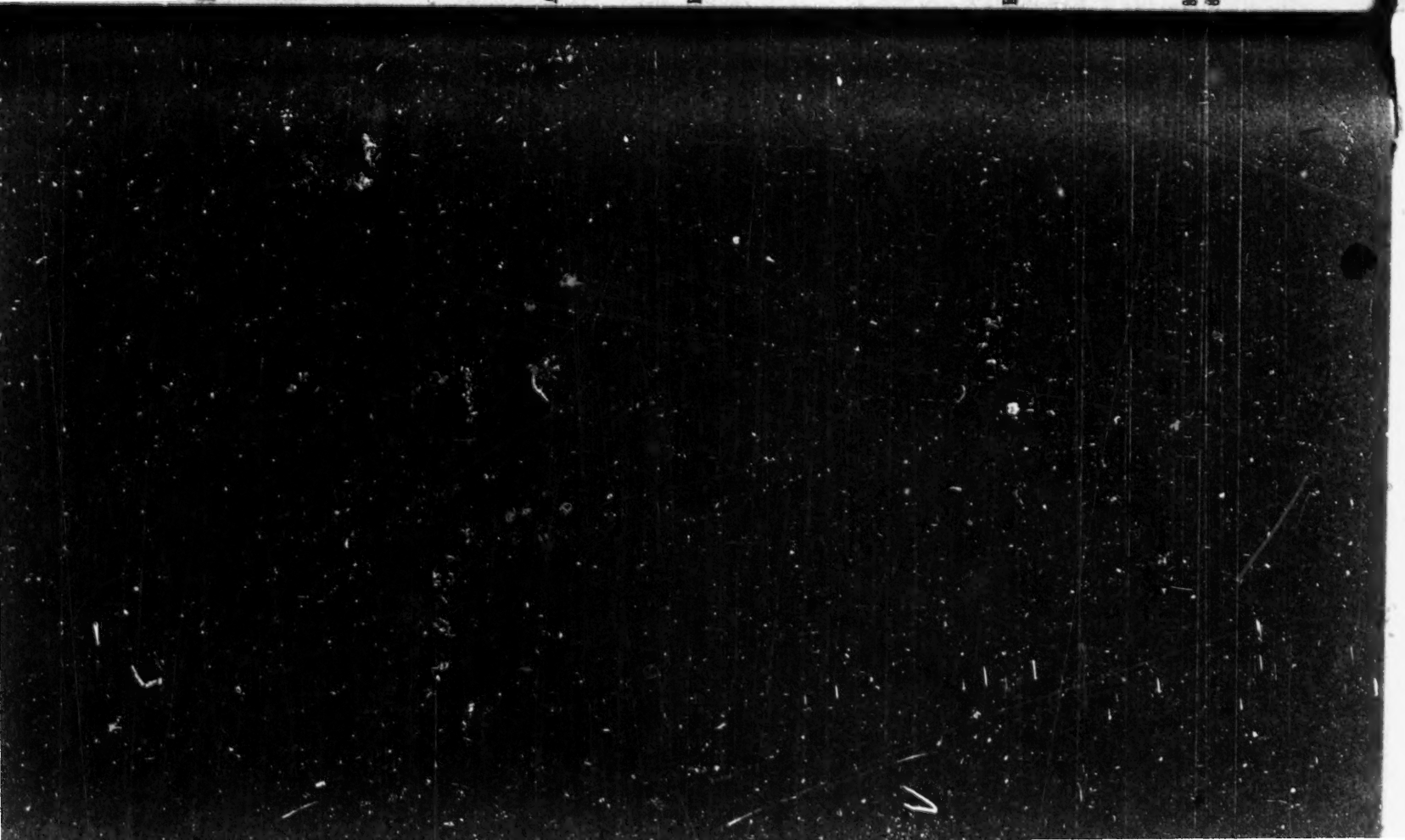
THE UNITED STATES OF AMERICA, APPELLANT

vs.

COLGATE-PALMOLIVE-PEET COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

FILED AUGUST 30, 1938



PREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 311

THE UNITED STATES OF AMERICA, APPELLANT

vs.

COLGATE-PALMOLIVE-PEET COMPANY

EAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

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In United States District Court, District of New Jersey

I, Benjamin F. Havens, Clerk of the District Court of the United States for the District of New Jersey, do hereby certify that the annexed is a true copy of Indictment No. 7920b in U. S. vs. Colgate-Palmolive Peet Company, a corporation, filed April 9, 1937, as the same remains of record, and on file in my office.

In testimony whereof, I have hereto subscribed my name and affixed the seal of said Court,, at Trenton, in said District, this 26th day of August A. D. nineteen hundred and thirty-eight.

BENJAMIN F. HAVENS,
Clerk.

[SEAL]

Per AMY D. BOND,
Deputy Clerk.

In United States District Court, District of New Jersey

Indictment

Filed April 9, 1937

In the District Court of the United States of America in and for the District of New Jersey, at the January Term thereof, in the year 1937.

The Grand Jurors of the United States of America duly empaneled, sworn and charged to inquire in and for the body of the said District of New Jersey, upon their oaths present:

COUNT 1

1. That throughout the period extending from January 1, 1932, to and including December 31, 1933, Colgate-Palmolive-Peet Company, hereinafter called defendant, was and still is, a corporation of the State of Delaware, having a place of business in Jersey City, in the State of New Jersey.

2. That throughout said period Erie Railroad Company, and The Cleveland, Cincinnati, Chicago & St. Louis Railroad Company were, and still are, corporation common carriers engaged in the transportation of property, in interstate commerce, by railroad, for hire, and over and by means of their respective connecting railway lines operated a through railway route for the transportation of property, including palm oil, in carload lots, from alongside vessels and other points in New York Harbor to Jeffersonville in the State of Indiana.

3. That throughout said period said common carriers had printed and had published and had filed with the Interstate Commerce Commission schedules and tariffs of rates and charges which named and showed the joint rate and charge of said common carriers, for the transportation of palm oil, in carload lots, from

alongside vessels and other points in said New York Harbor over said through railway route to said Jeffersonville, to be 40 cents per 100 pounds, said rate being hereinafter referred to as the line haul rate; that said schedules and tariffs providing said line haul rate further provided that said line haul rate applied from points within free lighterage limits of said New York Harbor provided for and in accordance with certain tariffs and schedules governing the acceptance and handling of freight, at, and for all deliveries in, said New York Harbor, which said last mentioned tariffs and schedules had been duly printed and had been published and had been filed with the Interstate Commerce Commission by said Erie Railroad Company; that said last mentioned schedules and tariffs provided and defined free lighterage and floatage limits in said New York Harbor and further provided that, when ordered by the shipper or consignee in writing and tank barges were available, such articles therein designated as "not lighterage free," including palm oil, would be handled in tank barges in lots of 240,000 pounds or more, in lieu of tank cars on floats, from alongside steamship in said free lighterage and floatage limits in said New York Harbor as defined in said schedules and tariffs, to the rail terminals of said Erie Railroad Company, the transfer from tank barges to tank cars to be at the expense of the shipper or consignee, for which service a charge of 2 cents per 100 pounds, hereinafter referred to as pumping charge, would be made in addition to said line haul rate; that said rate of 40 cents per 100 pounds and said pumping charge of 2 cents per 100 pounds were the lawful rates and the only lawful rates applicable on the shipment of palm oil hereinafter described.

4. That during said period on, to wit, September 26, 1932, said defendant tendered to said Erie Railroad Company at Pier 36, Brooklyn, in the State of New York, said point being within said free lighterage and floatage limits of said New York Harbor as defined in said schedules and tariffs, a shipment of palm oil of an aggregate weight of, to wit, 302,300 pounds, that being five carload lots, which said palm oil had theretofore transported to said New York Harbor by a certain vessel, to wit, S. S. "West Humhaw," with direction to transport said 302,300 pounds of palm oil from said Pier 36 in said New York Harbor, over said connecting railway lines, to said Jeffersonville, consigned to said defendant.

5. That during said period on, to wit, September 23, 1932, said defendant did order in writing from said Erie Railroad Company tank barges in lieu of tank cars on floats for the handling from alongside said vessel in said New York Harbor to the rail terminal of said Erie Railroad Company at Long Dock, Jersey City in the State of New Jersey, of said lot of palm oil which had been transported as aforesaid to said New York Harbor by said vessel.

6. That said Erie Railroad Company did thereupon at said Pier 36, accept delivery of said 302,300 pounds of palm oil and, tank barges being then and there available, did handle by and through its agent, Manhattan Lighterage Corporation, a corporation of the State of

ew York, said lot of palm oil by tank barge from said Pier 36 to id rail terminal at said Long Dock, and at said Long Dock did ump, by and through its agent, said Manhattan Lighterage Corpora- ion, said palm oil into certain railway tank cars bearing the initials nd numbers TPCX 102, SHPX 9109, SHPX 9101, SHPX 9146, and HPX 9118; that thereafter said common carriers did transport by ailroad said shipment loaded in and upon said railway tank cars s aforesaid, over said connecting railway line, and in and through he District of New Jersey and within the jurisdiction of this Court, o said Jeffersonville, and did deliver said shipment at said Jefferson- ille to said defendant and did collect from said defendant freight harges in the amount of, to wit, $1,209.20, based only upon the afore- id line haul rate of 40 cents per 100 pounds and said weight of, to it, 302,300 pounds.

7. That on, to wit, October 17, 1932, said Manhattan Lighterage orporation, pursuant to an arrangement and agreement theretofore ade with said defendant, and with intent secretly to assume and sorb for the benefit of said defendant said pumping charge of 2 nts per 100 pounds provided in said schedules and tariffs and appli- ble upon said shipment of palm oil, did pay and cause to be paid to said Erie Railroad Company, said pumping charge in the sum of, to wit, $60.49, being at the rate of 2 cents per 100 pounds upon the aforesaid weight of, to wit, 302,300 pounds.

8. That said defendant did pay for the transportation, including id pumping of oil from tank barges to tank cars, said sum of ,209.20, and only said sum of $1,209.20, instead of the lawful aggre- te freight charge, applicable under the aforesaid tariffs and sched- es, of, to wit, $1,269.69, based and computed upon said line haul te of 40 cents per 100 pounds, and said weight of, to wit, 302,300 unds, plus said pumping charge of 2 cents per 100 pounds and said eight of, to wit, 302,300 pounds; that said defendant did refrain om paying said common carriers or either of them, or said Man- ttan Lighterage Corporation or any other person or corporation, id pumping charge of 2 cents per 100 pounds applicable upon said ipment of palm oil under and by virtue of said tariffs and schedules.

9. That on, to wit, October 17, 1932, Colgate-Palmolive-Peet Com- ny, defendant aforesaid, in the District of New Jersey and within e jurisdiction of this Court, well knowing the premises aforesaid, lawfully did knowingly, by means of the device aforesaid, solicit, cept, and receive a concession of 2 cents per 100 pounds in respect the transportation of the aforesaid shipment of property by said mmon carriers in interstate commerce, whereby said property was nsported for said defendant from said point in New York Harbor said Jeffersonville at a less rate and charge than that named and ovided in the schedules and tariffs of said common carriers pub- hed and filed as aforesaid; contrary to the form of the statute in ch case made and provided and against the peace and dignity of e United States.

6 COUNT 2

And the Grand Jurors aforesaid, upon their oaths, aforesaid, do further present:

1. That throughout the period extending from January 1, 193 to and including December 31, 1933, Colgate-Palmolive-Peet Com pany, hereinafter called defendant, was and still is, a corporation of the State of Delaware, having a place of business in Jersey City in the State of New Jersey.

2. That throughout said period New York, Susquehanna and Western Railroad Company, Erie Railroad Company, and The Cleveland, Cincinnati, Chicago & St. Louis Railroad Company were, and still are, corporation common carriers engaged in the transportation of property, in interstate commerce, by railroad for hire, and over and by means of their respective connecting railway lines operated a through railway route for the transportation of property, including palm oil, in carload lots, from alongside vessels and other points in New York Harbor to Jeffersonville in the State of Indiana.

3. That throughout said period said common carriers had printed and had published and had filed with the Interstate Commerce Commission schedules and tariffs of rates and charges which named and showed the joint rate and charge of said common carriers, for the transportation of palm oil, in carload lots, from alongside vessels and other points in said New York Harbor, over said through railway route to said Jeffersonville, to be 40 cents per 100 pounds, said rate being hereinafter referred to as the line haul rate; that said schedules and tariffs providing said line haul rate further
7 provided that said line haul rate applied from points within free lighterage limits of said New York Harbor provided for and in accordance with certain tariffs and schedules governing the acceptance and handling of freight, at, and for all deliveries in, said New York Harbor, which said last mentioned tariffs and schedules had been duly printed and had been published and had been filed with the Interstate Commerce Commission by said New York, Susquehanna and Western Railroad Company; that said last mentioned schedules and tariffs provided and defined free lighterage and floatage limits in said New York Harbor and further provided that, when ordered by the shipper or consignee in writing and tank barges were available, such articles therein designated as "not lighterage free," including palm oil, would be handled in tank barges in lots of 240,000 pounds or more, in lieu of tank cars on floats, from alongside steamship in said free lighterage and floatage limits in said New York Harbor as defined in said schedules and tariffs, to the rail terminals of said Erie Railroad Company, the transfer from tank barges to tank cars to be at the expense of the shipper or consignee, for which service a charge of 2 cents per 100 pounds, hereinafter referred to as pumping charge, would be made in addition to said line haul rate; that said rate of 40 cents per 100 pounds and said pumping charge of 2 cents per 100 pounds were the lawful

ates and the only lawful rates applicable on the shipment of palm il hereinafter described.

4. That during said period on, to wit, July 23, 1932, said defendnt tendered to said New York, Susquehanna and Western Railroad ompany at Pier 3, Bush Docks, in the State of New York, said point being within said free lighterage and floatage limits of said New York Harbor as defined in said schedules and tariffs, together with other shipments of palm oil weighing in excess f 240,000 pounds, a shipment of palm oil of an aggregate weight of, wit, 60,000 pounds, that being a carload lot, which said palm oil as part of a larger lot of palm oil theretofore transported to said ew York Harbor by a certain vessel, to wit, "S. S. Salawatti," ith directions to transport said 60,000 pounds of palm oil from id Pier 3 in said New York Harbor, over said connecting railway nes, to said Jeffersonville, consigned to said defendant.

5. That during said period on, to wit, July 23, 1932, said defendant id order in writing from said New York, Susquehanna and Western ailroad Company tank barges in lieu of tank cars on floats for the andling from alongside said vessel in said New York Harbor to the il terminal of said New York, Susquehanna and Western Railroad ompany at Edgewater in the State of New Jersey, of said lot of alm oil which had been transported as aforesaid to said New York arbor by said vessel.

6. That said New York, Susquehanna and Western Railroad Comany did thereupon at said Pier 3, accept delivery of said 60,000 ounds of palm oil and, tank barges being then and there available, id handle by and through its agent, New York Tank Barge Co., Inc., corporation of the State of New York, said lot of palm oil by tank arge from said Pier 3 to said rail terminal at said Edgewater, and said Edgewater did pump, by and through its agent, said New ork Tank Barge Co., Inc., said palm oil into a certain railway tank car bearing the initials and number, SHPX 9100; that thereafter said common carriers did transport by railroad said shipment loaded in and upon said railway tank car as aforesaid, er said connecting railway line, and in and through the District of ew Jersey and within the jurisdiction of this Court, to said Jeffernville, and did deliver said shipment at said Jeffersonville to said fendant and did collect from said defendant freight charges in the mount of, to wit, $240.00 based only upon the aforesaid line haul rate 40 cents per 100 pounds and said weight of, to wit, 60,000 pounds.

7. That on, to wit, July 25, 1932, said New York Tank Barge Co., c., pursuant to an arrangement and agreement theretofore made ith said defendant, and with intent secretly to assume and absorb r the benefit of said defendant said pumping charge of 2 cents per 0 pounds provided in said schedules and tariffs and applicable upon id shipment of palm oil, did pay and cause to be paid to said New ork, Susquehanna and Western Railroad Company, said pumping arge in the sum of, to wit, $12.00, being at the rate of 2 cents per 0 pounds upon the aforesaid weight of, to wit, 60,000 pounds.

8. That said defendant did pay for the transportation, including said pumping of oil from tank barge to tank car, said sum of $240.00 and only said sum of $240.00, instead of the lawful aggregate freight charge applicable under the aforesaid tariffs and schedules of, to wit, $252.00, based and computed upon said line haul rate of 40 cents per 100 pounds, and said weight of, to wit, 60,000 pounds, plus said pumping charge of 2 cents per 100 pounds and said weight of, to wit, 60,000 pounds; that said defendant did refrain from paying said common carriers or either of them, or said New York Tank Barge Co., Inc., or any other person or corporation, said pumping charge of 2 cents per 100 pounds applicable upon said shipment of palm oil under and by virtue of said tariffs and schedules.

9. That on, to wit, September 25, 1932, Colgate-Palmolive-Peet Company, defendant aforesaid, in the District of New Jersey and within the jurisdiction of this Court, well knowing the premises aforesaid, unlawfully did knowingly, by means of the device aforesaid, solicit, accept and receive a concession of 2 cents per 100 pounds in respect of the transportation of the aforesaid shipment of property by said common carriers in interstate commerce, whereby said property was transported for said defendant from said point in New York Harbor to said Jeffersonville at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT 3

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs numbered 1, 2, and 3 of the second count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

2. That during said period on, to wit, July 23, 1932, said defendant tendered to said New York, Susquehanna and Western Railroad Company at Pier 3, Bush Docks, in the State of New York, said point being within said free lighterage and floatage limits of said New York Harbor as defined in said schedules and tariffs, together with other shipments of palm oil weighing in excess of 240,000 pounds, a shipment of palm oil of an aggregate weight of, to wit, 60,000 pounds, that being a carload lot, which said palm oil was part of a larger lot of palm oil theretofore transported to said New York Harbor by a certain vessel, to wit, S. S. "Salawatti," with directions to transport said 60,000 pounds of palm oil from said Pier 3 in said New York Harbor, over said connecting railway lines, to said Jeffersonville, consigned to said defendant.

3. That during said period on, to wit, July 23, 1932, said defendant did order in writing from said New York, Susquehanna and Western Railroad Company tank barges in lieu of tank cars on floats for the

andling from alongside said vessel in said New York Harbor to e rail terminal of said New York, Susquehanna and Western Rail-ad Company at Edgewater in the State of New Jersey, of said lot palm oil which had been transported as aforesaid to said New York Harbor by said vessel.

4. That said New York, Susquehanna and Western Railroad Company did thereupon at said Pier 3, accept delivery of said ,000 pounds of palm oil and, tank barges being then and there ailable, did handle by and through its agent, New York Tank arge Co., Inc., a corporation of the State of New York, said lot of alm oil by tank barge from said Pier 3 to said rail terminal at said dgewater, and at said Edgewater did pump, by and through its gent, said New York Tank Barge Co., Inc., said palm oil into a rtain railway tank car bearing the initials and number, EMTX 8001; at thereafter said common carriers did transport by railroad said ipment loaded in and upon said railway tank car as aforesaid, over id connecting railway line, and in and through the District of New rsey and within the jurisdiction of this Court, to said Jeffersonville, d did deliver said shipment at said Jeffersonville to said defendant d did collect from said defendant freight charges in the amount of, wit, $240.00 based only upon the aforesaid line haul rate of 40 nts per 100 pounds and said weight of, to wit, 60,000 pounds.

5. That on, to wit, July 25, 1932, said New York Tank Barge Co., c., pursuant to an arrangement and agreement theretofore made ith said defendant, and with intent secretly to assume and absorb r the benefit of said defendant said pumping charge of 2 cents per 0 pounds provided in said schedules and tariffs and applicable upon id shipment of palm oil, did pay and cause to be paid to said New ork, Susquehanna and Western Railroad Company, said pumping arge in the sum of, to wit, $12.00, being at the rate of 2 cents per 100 pounds upon the aforesaid weight of, to wit, 60,000 pounds.

6. That said defendant did pay for the transportation, including said pumping of oil from tank barge to tank car, said m of $240.00, and only said sum of $240.00, instead of the lawful gregate freight charge applicable under the aforesaid tariffs and edules of, to wit, $252.00, based and computed upon said line haul e of 40 cents per 100 pounds, and said weight of, to wit, 60,000 unds, plus said pumping charge of 2 cents per 100 pounds and said ight of, to wit, 60,000 pounds; that said defendant did refrain om paying said common carriers or either of them, or said New rk Tank Barge Co., Inc., or any other person or corporation, said mping charge of 2 cents per 100 pounds applicable upon said ship-nt of palm oil under and by virtue of said tariffs and schedules.

7. That on, to wit, July 25, 1932, Colgate-Palmolive-Peet Com-ny, defendant aforesaid, in the District of New Jersey and within jurisdiction of this Court, well knowing the premises aforesaid, lawfully did knowingly, by means of the device aforesaid, solicit, cept and receive a concession of 2 cents per 100 pounds in respect the transportation of the aforesaid shipment of property by said

common carriers in interstate commerce, whereby said property was transported for said defendant from said point in New York Harbor to said Jeffersonville at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

14 COUNT 4

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs numbered 1, 2, and 3 of the second count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

2. That during said period on, to wit, July 23, 1932, said defendant tendered to said New York, Susquehanna, and Western Railroad Company at Pier 3, Bush Docks, in the State of New York, said point being within said free lighterage and floatage limits of said New York Harbor as defined in said schedules and tariffs, together with other shipments of palm oil weighing in excess of 240,000 pounds, a shipment of palm oil of an aggregate weight of, to wit, 60,000 pounds, that being a carload lot, which said palm oil was part of a larger lot of palm oil theretofore transported to said New York Harbor by a certain vessel, to wit, S. S. "Salawatti," with directions to transport said 60,000 pounds of palm oil from said Pier 3 in said New York Harbor, over said connecting railway lines, to said Jeffersonville, consigned to said defendant.

3. That during said period on, to wit, July 23, 1932, said defendant did order in writing from said New York, Susquehanna and Western Railroad Company tank barges in lieu of tank cars on floats for the handling from alongside said vessel in said New York Harbor to the rail terminal of said New York, Susquehanna and Western
15 Railroad Company at Edgewater in the State of New Jersey, of said lot of palm oil which had been transported as aforesaid to said New York Harbor by said vessel.

4. That said New York, Susquehanna and Western Railroad Company did thereupon at said Pier 3, accept delivery of said 60,000 pounds of palm oil and, tank barges being then and there available, did handle by and through its agent, New York Tank Barge Co., Inc., a corporation of the State of New York, said lot of palm oil by tank barge from said Pier 3 to said rail terminal at said Edgewater, and at said Edgewater did pump, by and through its agent, said New York Tank Barge Co., Inc., said palm oil into a certain railway tank car bearing the initials and number STCX 9066; that thereafter said common carriers did transport by railroad said shipment loaded in and upon said railway tank car as aforesaid, over said connecting railway line, and in and through the District of

New Jersey and within the jurisdiction of this Court, to said Jeffersonville, and did deliver said shipment at said Jeffersonville to said defendant and did collect from said defendant freight charges in the amount of, to wit, $240.00 based only upon the aforesaid line haul rate of 40 cents per 100 pounds and said weight of, to wit, 60,000 pounds.

5. That on, to wit, July 25, 1932, said New York Tank Barge Co., Inc., pursuant to an arrangement and agreement theretofore made with said defendant, and with intent secretly to assume and absorb for the benefit of said defendant said pumping charge of 2 cents per 100 pounds provided in said schedules and tariffs and
16 applicable upon said shipment of palm oil, did pay and cause to be paid to said New York, Susquehanna and Western Railroad Company, said pumping charge in the sum of, to wit, $12.00, being at the rate of 2 cents per 100 pounds upon the aforesaid weight of, to wit, 60,000 pounds.

6. That said defendant did pay for the transportation, including said pumping of oil from tank barge to tank car, said sum of $240.00, and only said sum of $240.00, instead of the lawful aggregate freight charge applicable under the aforesaid tariffs and schedules of, to wit, $252.00, based and computed upon said line haul rate of 40 cents per 100 pounds, and said weight of, to wit, 60,000 pounds, plus said pumping charge of 2 cents per 100 pounds and said weight of, to wit, 60,000 pounds; that said defendant did refrain from paying said common carriers or either of them, or said New York Tank Barge Co., Inc., or any other person or corporation, said pumping charge of 2 cents per 100 pounds applicable upon said shipment of palm oil under and by virtue of said tariffs and schedules.

7. That on, to wit, July 25, 1932, Colgate-Palmolive-Peet Company, defendant aforesaid, in the District of New Jersey and within the jurisdiction of this Court, well knowing the premises aforesaid, unlawfully did knowingly, by means of the device aforesaid, solicit, accept and receive a concession of 2 cents per 100 pounds in respect of the transportation of the aforesaid shipment of property by said common carriers in interstate commerce, whereby said property was transported for said defendant from said point in New York Harbor to said Jeffersonville at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

17

COUNT 3

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs numbered 1, 2, and 3 of the second count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

2. That during said period on, to wit, July 23, 1932, said defendant tendered to said New York, Susquehanna and Western Railroad Company at Pier 3, Bush Docks, in the State of New York, said point being within said free lighterage and floatage limits of said New York Harbor as defined in said schedules and tariffs, together with other shipments of palm oil weighing in excess of 240,000 pounds, a shipment of palm oil of an aggregate weight of, to wit, 60,000 pounds, that being a carload lot, which said palm oil was part of a larger lot of palm oil theretofore transported to said New York Harbor by a certain vessel, to wit, S. S. "Salawatti," with directions to transport said 60,000 pounds of palm oil from said Pier 3 in said New York Harbor, over said connecting railway lines, to said Jeffersonville, consigned to said defendant.

3. That during said period on, to wit, July 23, 1932, said defendant did order in writing from said New York, Susquehanna and
18 Western Railroad Company tank barges in lieu of tank cars on floats for the handling from alongside said vessel in said New York Harbor to the rail terminal of said New York, Susquehanna and Western Railroad Company at Edgewater in the State of New Jersey, of said lot of palm oil which has been transported as aforesaid to said New York Harbor by said vessel.

4. That said New York, Susquehanna and Western Railroad Company did thereupon at said Pier 3, accept delivery of said 60,000 pounds of palm oil and, tank barges being then and there available, did handle by and through its agent, New York Tank Barge Co., Inc., a corporation of the State of New York, said lot of palm oil by tank barge from said Pier 3 to said rail terminal at said Edgewater, and at said Edgewater did pump, by and through its agent, said New York Tank Barge Co., Inc., said palm oil into a certain railway tank car bearing the initials and number, EMTX 8002; that thereafter said common carriers did transport by railroad said shipment loaded in and upon said railway tank car as aforesaid, over said connecting railway line, and in and through the District of New Jersey and within the jurisdiction of this Court, to said Jeffersonville, and did deliver said shipment at said Jeffersonville to said defendant and did collect from said defendant freight charges in the amount of, to wit, $240.00 based only upon the aforesaid line haul rate of 40 cents per 100 pounds and said weight of, to wit, 60,000 pounds.

5. That on, to wit, July 25, 1932, said New York Tank Barge Co., Inc., pursuant to an arrangement and agreement theretofore
19 made with said defendant, and with intent secretly to assume and absorb for the benefit of said defendant said pumping charge of 2 cents per 100 pounds provided in said schedules and tariffs and applicable upon said shipment of palm oil, did pay and cause to be paid to said New York, Susquehanna and Western Railroad Company, said pumping charge in the sum of, to wit, $12.00, being at the rate of 2 cents per 100 pounds upon the aforesaid weight of, to wit, 60,000 pounds.

6. That said defendant did pay for the transportation, including said pumping of oil from tank barge to tank car, said sum of $240.00, and only said sum of $240.00, instead of the lawful aggregate freight charge applicable under the aforesaid tariffs and schedules of, to wit, $252.00, based and computed upon said line haul rate of 40 cents per 100 pounds, and said weight of, to wit, 60,000 pounds, plus said pumping charge of 2 cents per 100 pounds and said weight of, to wit, 60,000 pounds; that said defendant did refrain from paying said common carriers or either of them, or said New York Tank Barge Co., Inc., or any other person or corporation, said pumping charge of 2 cents per 100 pounds applicable upon said shipment of palm oil under and by virtue of said tariffs and schedules.

7. That on, to wit, July 25, 1932, Colgate-Palmolive-Peet Company, defendant aforesaid, in the District of New Jersey and within the jurisdiction of this Court, well knowing the premises aforesaid, unlawfully did knowingly, by means of the device aforesaid, solicit, accept, and receive a concession of 2 cents per 100 pounds in respect of the transportation of the aforesaid shipment of property by said common carriers in interstate commerce, whereby said property was transported for said defendant from said point in New York Harbor to said Jeffersonville at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

JOHN J. QUINN,
United States Attorney.

The United States of America vs. Colgate-Palmolive Peet Company, a corporation. Indictment for Viol. Sec. 1, Elkins Act; Sec. 1, Title 49 U. S. C. A True Bill. J. L. Williamson, Foreman. John J. Quinn, U. S. Attorney.

[File endorsement omitted.]

In United States District Court, District of New Jersey

Criminal No. 7920–b

[Title omitted.]

Plea in bar to indictment

Filed June 18, 1937

This defendant, Colgate-Palmolive-Peet Company, a corporation, by its attorneys in this behalf, Wall, Haight, Carey & Hartpence, comes into court here, and having heard read the said alleged indictment found at the January Term of this court in the year 1937, which said alleged indictment was filed April 9, 1937, says that the United

States of America ought not further to prosecute said indictment, or any count thereof, against it, because of the following matters and things, which it pleads in bar of its prosecution for any and all of the alleged offenses therein charged, and respectfully avers as follows, to wit:

1. That the alleged offenses attempted to be set forth in each and every count of the said alleged indictment, if committed at all, were committed more than three years preceding the return of the alleged indictment herein, during which period said defendant had not fled justice, and consequently prosecution thereof is barred by the statute of limitations applicable thereto, 18 U. S. Code, section 582.

22 2. Defendant repeats and realleges the averments of Paragraph 1 hereof, and further shows that, at the April Term in the year 1934 of this court, an indictment was returned by the Grand Jury, being file number 6817–b, covering the same offenses attempted to be alleged in and by the present alleged indictment. That thereafter defendant filed a motion to quash the indictment returned by the April 1934 Grand Jury, and thereafter, to wit: March 15, 1937, an order was entered at the instance of the United States Attorney in that said cause, reading as follows:

"It appearing that motions to quash the indictment have been filed in the above matter, which said motions raise the same points as were raised in a similar motion filed in United States v. Durkee Famous Foods, Inc., No. 6821–b; and

"It further appearing that a memorandum opinion has been filed in the last mentioned case and an order quashing the indictment in that case having been entered in accordance therewith,

"Now, March 15, 1937, for the reasons set forth in the opinion filed in United States vs. Durkee Famous Foods, Inc., No. 6821–b, the indictment in this case be and it is hereby quashed.

"GUY L. FAKE, *Judge.*"

That the indictment herein returned by the January 1937 Grand Jury was not returned in conformity with 18 U. S. Code, section 557, which provides only for the return of a new indictment where one has been found defective, "at any time during the next succeeding term of court following such finding, during which a grand jury thereof shall be in session," inasmuch as the next succeeding term of court following March 15, 1937, was the April Term commencing April 6, 1937.

23 3. The defendant realleges and reaffirms the averments of Paragraphs 1 and 2 hereof, and further shows that, as appears from the opinion of the court filed in United States vs. Durkee Famous Foods, Inc., No. 6821–b, the indictment returned by the April 1934 Grand Jury, No. 6817–b, was by the court found bad in substance and the allegations thereof not to constitute a crime. The said order quashing said indictment was therefore an appealable order under 18 U. S. Code, section 682, and consequently 18 U. S.

Code, Section 587, has no application to such an order, but is, and is intended to be, confined to the quashing of indictments for defects of form and pleadings, which orders are not appealable under 18 U. S. Code, section 682.

All of which said defendant, Colgate-Palmolive-Peet Company, a corporation, is ready and willing to verify, and therefore pleads the same in bar of any prosecution or punishment under said indictment or any count thereof, and says that to prosecute or punish it thereunder for any of the alleged offenses charged therein is contrary to the provisions of the statute of limitations, 18 U. S. Code, section 582.

Wherefore, the defendant prays judgment that the said alleged indictment be not further prosecuted against it, and that by
24 this court it may be dismissed and discharged from the said premises without day and the said alleged indictment held for naught and quashed.

Dated: Trenton, N. J., June 18th, 1937.

COLGATE-PALMOLIVE-PEET COMPANY,
a corporation, *Defendant*,
By WALL, HAIGHT, CAREY & HARTPENCE,
Attorneys, Office and Post Office Address,
15 Exchange Place, Jersey City, N. J.

We hereby certify that the foregoing plea in bar is not interposed for delay, and in our opinion is well founded in point of law.

Dated: Trenton, N. J., June 18, 1937.

WALL, HAIGHT, CAREY & HARTPENCE,
By JOHN A. HARTPENCE,
Counsel for Defendant,
Colgate-Palmolive-Peet Company, a corporation.

[File endorsement omitted.]

25 In United States District Court for the District of New Jersey

Criminal No. 7920-b

[Title omitted.]

Answer of United States to plea in bar to indictment

Filed Aug. 2, 1937

And now, August 2nd, 1937, comes the United States of America, by John J. Quinn, United States Attorney in and for the District of New Jersey, and in answer to the Plea in Bar to the indictment filed April 9, 1937, in the above matter, respectfully represents:

1. That in answer to the averments contained in paragraph numbered 1 of the Plea in Bar it is admitted that the alleged offenses set forth in each and every count of said indictment were committed more than three years preceding April 9, 1937, the date when said

indictment was returned, during which period said defendant had not fled justice, but denies that prosecution of each and every offense alleged to have been committed in said indictment is barred by the statute of limitations.

26 2. That in answer to the averments contained in paragraph numbered 2 of the Plea in Bar it is admitted that at the April Term in the year 1934 of this Court an indictment was returned by the grand jury, at file No. 6817b, covering the same offenses alleged in and by the present indictment; that thereafter defendant herein filed a motion to quash said indictment returned by the April 193 grand jury, and that thereafter on March 15, 1937, an order was entered on defendant's motion to quash said indictment in the language set out in paragraph 2 of the Plea in Bar; but denies that the indictment herein, which was returned by the January 1937 grand jury, was not returned in conformity with 18 U. S. Code, Section 587, and further avers that under and by virtue of 18 Code, Sec. 58 limitation of prosecution of the offenses alleged in the indictment herein to have been committed by said defendant, was stayed.

3. That in answer to the averments contained in paragraph numbered 3 of said Plea in Bar it is denied that the opinion of the Court upon which the aforesaid order quashing said previous indictment was made held that said previous indictment was bad in substance in that no offense described by 49 U. S. Code, Sec. 41, had been alleged to have been committed, but avers that said opinion holding that said previous indictment was insufficient was based upon a construction of said indictment so as to demonstrate the failure of the government to allege essential facts necessary to bring the

27 offense within the provisions of 49 U. S. Code, Section 41; and in further answer it is averred that, whether or not the order made quashing said previous indictment was an appealable order under 18 U. S. Code, Section 682, is immaterial in so far as the application of 18 U. S. Code, Section 587, is concerned.

4. And in further general answer it is averred that the indictment herein, filed April 9, 1937, is otherwise good and sufficient in law.

Wherefore, the United States of America prays that said Plea in Bar be forthwith dismissed and that said defendant be put upon trial.

UNITED STATES OF AMERICA,
By JOHN J. QUINN,
United States Attorney.
WILLIAM F. SMITH,
Assistant United States Attorney.
DANIEL H. KUNKEL,
Special Assistant to the United States Attorney.

[File endorsement omitted.]

28 In United States District Court, District of New Jersey

Criminal No. 7918–b

UNITED STATES OF AMERICA

v.

DURKEE FAMOUS FOODS, INC.

Criminal No. 7919–b

UNITED STATES OF AMERICA

v.

MANHATTAN LIGHTERAGE CORPORATION

Criminal No. 7920–b

UNITED STATES OF AMERICA

v.

COLGATE-PALMOLIVE-PEET COMPANY

Opinion

(On defendants' pleas in bar to indictments)

NEWARK, N. J.,
Tuesday, June 14, 1938.

Before Hon. GUY L. FAKE, U. S. D. J.

Appearances: Daniel H. Kunkel, Esq., Special Assistant to the United States Attorney, for the Government. Roger Hinds, Esq., for defendant Durkee Famous Foods, Inc. Frank M. Swacker, Esq., for defendant Manhattan Lighterage Corporation. Messrs. Wall, Haight, Carey & Hartpence, by John A. Hartpence, Esq., and Alfred F. Conway, Esq., for defendant Colgate-Palmolive-Peet Company.

W. W. Heironimus, Official Reporter.

29 The COURT (Orally, at close of argument.) The issues here arise on three indictments, to each of which pleas in bar have been filed. This memorandum will be dispositive of the three cases.

The defendants were indicted on the 9th of April 1937, for alleged violations of the Elkins Act, Title 49, Section 41.

The acts complained of in the indictments having been committed, according to the dates set forth therein, more than three years prior to the filing of the indictments, Section 582 of Title 18 of the U. S. Code provides as follows:

"No person shall be prosecuted, tried or punished for any offense, not capital, except as provided in Section 584 of this Title, unless the indictment is found or action is instituted within three years next after such offense shall have been committed."

It is contended for the Government that the pleas should not be sustained because Section 587 of Title 18 of the U. S. Code provides as follows:

"Whenever an indictment is found defective or insufficient for any cause after the period prescribed and the applicable Statute of Limitations has expired, a new indictment may be returned at any time during the next succeeding term of Court following such finding, during which the Grand Jury thereof shall be in session."

It is urged that a reasonable and proper consideration of this section causes it to become effective as to the then existing term of Court, notwithstanding the fact that the statute itself is silent as to the then existing term. (Citing Endlich on Interpretation of Statutes, pages 599, etc. U. S. v. N. Y. Central Railroad, 212 U. S. 39, U. S. v. Koenig Coal Co., 270 U. S. 512, U. S. vs. Baltimore
30 Post Co., 2 Fed. (2d) 761, affirmed 268 U. S. 388. Ozawa vs. U. S. 260 U. S. 178.)

Counsel for the defendants argue that to so construe the statute would cause the Court to enter the sphere of the legislature and in effect amend the Act to read as follows:

"A new indictment may be returned at any time during the next succeeding term of court, following such finding, during which the Grand Jury thereof shall be in session and as well at the Term in which the indictment is found defective."

Moreover, it is urged that Section 587 must be strictly construed because it is an exception to the Statute of Limitations.

Other arguments are offered by counsel for the defense, which appear in defendant's briefs. They cite the following cases to sustain their position: U. S. v. Shelton, 2 Wheaton 119–121 and 122. U. S. vs. McElvaine, 272 U. S. 633 at 639. U. S. vs. Scherton, 285 U. S. 518 at 521–2. 16 Corpus Juris 228, Section 350.

The indictments were returned by a Grand Jury sitting for the January Term of Court on April 9, 1937, but within the time fixed by law for the April Term of Court at Newark, the January Term having been extended by an order of the Court.

At the time the previous indictments were quashed by this Court, the three-year Statute of Limitations had then run against the alleged offenses.

* * * * * * *

NEWARK, N. J.,
Monday, June 27, 1938.

(Hearing continued from June 14, 1938. Same appearances.)

The COURT. (Orally, at close of argument.) At the last session I stated the facts and raised the issues upon which counsel have appeared before me today. Both sides have been diligent in their endeavors to assist the Court in ascertaining the law to be followed
31 here. No cases have been discovered bearing upon a construction of the section of the Statute of Limitations which is here involved. This has resulted in much research in an endeavor to find an analogous situation, and upon careful consideration of the arguments presented by counsel, as well as a consideration of the

cases they have cited, it is my conclusion that the Court, being without power to amend the statute involved, and it appearing that the statute itself contains no ambiguity, either patent or latent, must give to the statute the generally accepted meaning of the language used therein. This leads to the inescapable conclusion that where an indictment has been found to be defective after the passage of the prescribed period of limitation, the one and only Grand Jury which can hand down a new indictment is that Grand Jury which is authorized to act at the term next succeeding the term at which the Court found the indictment to be defective; and it appearing, as it does here, that the indictments under review were not found by a Grand Jury authorized as aforesaid, the indictments must necessarily fall.

The pleas in bar are therefore sustained.

22 In United States District Court, District of New Jersey

On Plea in Bar. Criminal No. 7920–B

UNITED STATES OF AMERICA

vs.

COLGATE-PALMOLIVE-PEET COMPANY, DEFENDANT

Order sustaining plea in bar

Filed June 28, 1938

This matter being opened to the Court by John A. Hartpence, Esq., of counsel with the defendant, Colgate-Palmolive-Peet Company, upon said defendant's Plea in Bar to the indictment herein and each and every count thereof, and due notice to plead having been duly served upon the attorney for said defendant by the United States Attorney, and the United States of America appearing by John J. Quinn, Esq., United States Attorney, and Daniel H. Kunkel, Esq., Special Assistant United States Attorney, and the said defendant Colgate-Palmolive-Peet Company appearing by John A. Hartpence, Esq., its attorney, and the Court having heard and considered the matter on argument, and on the briefs of the respective counsel, and it appearing that said Plea in Bar is good and sufficient and should be sustained;

It is, on this 28 day of June, 1938, ordered that the said Plea in Bar to said indictment herein be and the same is hereby sustained, and that said indictment be not further prosecuted against said defendant, and that said indictment be and the same is hereby accordingly dismissed, discharged, held for nought, and quashed.

GUY L. FAKE,
United States District Court Judge.

Consented to as to form only:
JOHN J. QUINN,
United States Attorney.
By: DANIEL H. KUNKEL,
Special Assistant United States Attorney.

[File endorsement omitted.]

33 In United States District Court, District of New Jersey

Order continuing the January 1937 Term of Court at Trenton, New Jersey, to the April 1937 Term of Court at Newark, New Jersey

Filed April 5, 1937

It being presented to the Court by John J. Quinn, United States Attorney for the District of New Jersey, that certain sentences are still pending in cases before this Court, and other business of the United States is still pending before the Court, and application being made,

It is, thereupon on this 5th day of April 1937, ordered that the January 1937 Term of this Court be and the same is hereby extended and continued during the April 1937 Term and until the further order of this Court for the following and all other purposes:

1. In order that the Grand Jury of that term may dispose of its unfinished business.

2. In order that the sentences set forth on the annexed list marked "Schedule A" and all other sentences pending before the Court may be imposed.

3. In order that any other business, procedure, or practice pertaining to the Court or the Government of the United States may be transacted identically as if the January 1937 Term of Court had not expired.

FORMAN, *Judge.*

[File endorsement omitted.]

36 In United States District Court for the District of New Jersey

Criminal No. 7920–B

[Title omitted.]

Petition for appeal

Filed July 25, 1938

Now comes the United States of America, plaintiff, by its counsel and says that on June 28, 1938, this court rendered its judgment in favor of the defendant against the plaintiff, in which judgment and proceedings had prior thereto in said cause certain errors were committed to the prejudice of the plaintiff, all of which will more fully appear from the assignment of errors herewith filed.

Wherefore, United States of America prays that an appeal may issue in its behalf to the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in said cause, duly authenticated

may be transmitted forthwith to the Supreme Court of the United States.

John J. Quinn,
JOHN J. QUINN,
United States Attorney.

Dated this 25th day of July, 1938.

[File endorsement omitted.]

37 In United States District Court for the District of New Jersey

Criminal No. 7920–B

[Title omitted.]

Assignment of errors

Filed July 25, 1938

United States of America, plaintiff, by its counsel, now comes and, in connection with its petition for an appeal, files the following assignment of errors upon which it will rely in its appeal to the Supreme Court of the United States from the final judgment rendered by this Court on June 28, 1938.

The District Court erred:

1. In sustaining the plea in bar.

2. In not overruling and dismissing the plea in bar.

3. In holding and adjudging that the statute of limitations had barred the prosecution of the offenses alleged in the several counts of the indictment.

4. In holding and adjudging that the Act of May 10, 1934 (U. S. C. Title 18, Sec. 587), did not limit the application of the statute of limitations (U. S. C. Title 18, Sec. 582), so as to permit the new indictment to be returned by the grand jury empaneled at and in session during the same term of court at which the prior indictment was found defective and insufficient.

5. In holding and adjudging that the Act of May 10, 1934 (U. S. C. Title 18, Sec. 587), was effective to say the statute of limitations only where the new indictment is returned by a grand jury in session during the next succeeding term of court following the term at
38 which the prior indictment was found defective or insufficient.

6. In failing and refusing to construe the statutes on which the new indictment was founded as permitting the return of the new indictment by the grand jury empaneled at and for and in session during the same term of court at which the prior indictment was found defective or insufficient.

7. In failing and refusing to construe the Act of May 10, 1934 (U. S. C. Title 18, Sec. 587), as permitting the return of the new indictment by the grand jury empaneled at and for and in session during the term of court at which the prior indictment was found defective or insufficient.

8. In failing and refusing to construe the Act of May 16, 19 (U. S. C. Title 18, Sec. 587), as permitting the return of the n indictment by the first grand jury in session upon or following t date upon which the prior indictment was found defective or insu ficient, regardless of whether such grand jury was empaneled for t same term, or the next succeeding term, or some still later term fo lowing the term of court at which the prior indictment was fou defective or insufficient.

9. In entering the order of June 28, 1938, sustaining the plea bar and dismissing and quashing the indictment.

JOHN J. QUINN,
John J. Quinn,
United States Attorney.

Dated this 1st day of July 1938.

[File endorsement omitted.]

39 In United States District Court for the District of New Jersey

Criminal No. 7920–B

[Title omitted.]

Order allowing appeal

Filed July 25, 1938

United States of America, plaintiff, having by its counsel made a filed its petition praying an appeal to the Supreme Court of t United States from the final judgment of this Court entered on Ju 28, 1938, and having also made and filed an assignment of errors, a having in all respects conformed to the statutes and rules of cou in such case made and provided:

It is ordered and adjudged that the appeal be and the same hereby allowed as prayed and made returnable within forty (4 days from the date hereof, and the clerk is directed to transmit forth with to the Supreme Court of the United States a properly authen cated transcript of the record, proceedings, and papers on which sa final judgment was made and entered.

This 25 day of July 1938.

JOHN BOYD AVIS.
United States District Judge.

[File endorsement omitted.]

40 [Citation in usual form showing service on Wall, Haig Casey & Hartpence, filed July 29, 1938, omitted in printing

42 In United States District Court, District of New Jersey

No. 7920–b

[Title omitted.]

Docket entries

1937
Apr. 9—Indictment for Violating Section 1, Elkins Act &c.
June 1—Ordered adjourned to June 18, 1937.
18—Plea in bar by Wall, Haight, Carey, & Hartpence, Attys., Jersey City, N. J., filed.
Aug. 2—Answer of United States to plea in bar filed.
1938
June 14—Argument on plea in bar before Judge Fake.
" —Ord. off to June 27, 1938.
27—Oral Opinion by Judge Fake sustaining plea in bar &c filed.
28—Order sustaining plea in Bar & Dismissing Indictment, &c filed (Fk).
July 25—Petition for Appeal filed.
" —Assignment of Errors filed.
" —Order allowing Appeal filed (Avis).
" —Citation issued.
" —Statement as to Jurisdiction filed.
" —Notice to Appeal.
29— " " " ret'd (executed).
" —Citation ret'd (executed).
30—Praecipe for Transcript of Record filed.

43 In United States District Court for the District of New Jersey

Criminal No. 7920–B

[Title omitted.]

Praecipe for transcript of record

Filed July 30, 1938

To the CLERK OF THE DISTRICT COURT:

Please transmit to the Supreme Court of the United States as the transcript of record in the above entitled case, the following pleadings, documents and records:

1. Indictment.
2. Plea in bar.
3. Answer to plea in bar.
4. Opinion of court sustaining the plea in bar.
5. Order on opinion sustaining the plea in bar and quashing the indictment.
6. Order of Court extending the January 1937 Trenton term.
7. Petition for appeal.
8. Assignment of errors.
9. Statement as to jurisdiction.

11. Notice of service on appellee of petition for appeal, order allowing appeal, assignment of errors, and statement as to jurisdiction.
12. Citation on appeal.
44 13. All docket entries in proper order.
14. Praecipe for transcript of record.
15. Clerk's certificate.

John J. Quinn,
JOHN J. QUINN,
United States Attorney.

Service of a copy of the above praecipe is hereby acknowledged this —— day of July, 1938.

———— ————,
Attorneys for defendant.

[File endorsement omitted.]

45 [Clerk's certificate to foregoing transcript omitted in printing.]

46 In United States District Court, District of New Jersey

Indictment

In the District Court of the United States of America in and for the District of New Jersey, at the April Term thereof, in the year 1934.

The Grand Jurors of the United States of America duly empaneled, sworn and charged to inquire in and for the body of the said District of New Jersey, upon their oaths present:

COUNT 1

1. That throughout the period extending from January 1, 1932, to and including September 30, 1933, Colgate-Palmolive-Peet Company, hereinafter called defendant, was and still is, a corporation of the State of Delaware, having a place of business in Jersey City, in the State of New Jersey.

2. That throughout said period Manhattan Lighterage Corporation was and still is a corporation of the State of New York, and was engaged, among other things, in the operation of tank barges in New York Harbor and in the business of transporting by tank barge certain bulk fluid commodities, to wit, palm oil, cocoanut oil, olive oil foots, china wood oil, perilla oil, soya bean oil, fish oil, and molasses, from alongside steamship and other points in said New York Harbor to the railway lines and rail terminals of common carriers by railroad located at points contiguous to New York Harbor.

47 3. That throughout said period Erie Railroad Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, were and still are corporation common carriers engaged in the transportation of property, in interstate commerce, by railroad, for hire, and over and by means of their respective connecting railway lines, operated a through railway route for the transportation of property

including palm oil, in carload lots, from alongside vessels in said New York Harbor to a certain point on the line of said The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, to wit, Jeffersonville in the State of Indiana.

4. That throughout said period said common carriers had printed and had published and had filed with the Interstate Commerce Commission schedules of tariffs of rates and charges which showed a joint rate and charge of said carriers for the transportation of palm oil, in carload lots, from said New York Harbor to said Jeffersonville, over said through railway route, of 40 cents per 100 pounds; that said schedules and tariffs providing said rate of 40 cents per 100 pounds further provided that said rate applied from points within free lighterage limits of said New York Harbor as provided for and in accordance with certain tariffs and schedules of rules, regulations and charges governing the acceptance and handling of freight at, and for all deliveries in, said New York Harbor, which said tariffs and schedules had been duly printed and had been published and had been filed with the Interstate Commerce Commission, by said Erie Railroad Company; that said last mentioned tariffs and
48 schedules provided and defined free lighterage and floating limits in said New York Harbor to be:

North River:

New York side—Battery to 135th Street.

New Jersey side—National Storage Docks, Communipaw, to and including Fort Lee, N. J.

East River and Harlem River:

New York side—Battery to Jerome Avenue Bridge, including Harlem River side of Ward's and Randall's Islands.

Brooklyn side—From Pot Cove, Astoria, to and including Newtown and Dutch Kills Creeks, and points in Wallabout Canal, and to Hamilton Avenue Bridge, Gowanus Canal, and to and including 69th Street, South Brooklyn (Bay Ridge).

New York Bay:

Points on north and east shore of Staten Island between Bridge Creek (Arlington) and Clifton, both inclusive, and including Shooter Island.

Points on the New Jersey shore of New York Bay and on the Kill von Kull between Constable Hook and Avenue C, Bayonne City, opposite Port Richmond, S. I.;

that said last mentioned tariffs and schedules further provided that property therein specified as articles "not lighterage free," including palm oil, when loaded in tank cars, would be accorded free floatage privilege in lots of six cars or over, or when loaded in less than six cars, provided the total weight of shipments equaled or exceeded 240,000 pounds; that said last mentioned tariffs and schedules further provided that when such articles therein designated as "not lighterage free," including palm oil, in lots of 240,000 pounds, were handled

in tank barges in lieu of tank cars on floats from alongside steamship and other points in said free lighterage and floatage limits in said New York Harbor, the transfer from barges to tank cars would be at the expense of the shipper, for which service a charge of 2 cents per 100 pounds would be made in addition to the rate from New York; that said rate of 40 cents per 100 pounds and said pumping charge of 2 cents per 100 pounds, were the lawful rates and the only lawful rates applicable on the shipment of palm oil hereinafter described.

5. That prior to September 26, 1932, said Erie Railroad Company and said Manhattan Lighterage Corporation had entered into an agreement and arrangement whereby said Manhattan Lighterage Corporation agreed and undertook, among other things, to furnish all necessary marine equipment and to transport in tank barges of said Manhattan Lighterage Corporation all shipments of oils and other bulk commodities as designated by said Erie Railroad Company from designated points within said free lighterage and floatage limits of said New York Harbor, to designated piers of said Erie Railroad Company in the State of New Jersey and other points, including the pumping of shipments from tank barges into tank cars designated and placed by said Erie Railroad Company on and at said piers, for and at a compensation of, to wit, 6½ cents per 100 pounds; that said arrangement and agreement was in full force and effect throughout all times mentioned in this indictment.

6. That during said period on, to wit, September 26, 1932, said defendant tendered to said Erie Railroad Company at Pier 36, Brooklyn, in the State of New York, being within said free lighterage and floatage limits of said New York Harbor, a shipment of palm oil of an aggregate weight of, to wit, 302,300 pounds, that being 5 carload lots, which said palm oil was a part of a larger lot of oil theretofore transported to said New York Harbor by a certain vessel, to wit, "West Humhaw," with directions to transport said 302,300 pounds of palm oil from said New York Harbor over said connecting railway lines, to said Jeffersonville, consigned to said defendant; that said Erie Railroad Company, by and through its said agent, Manhattan Lighterage Corporation then and there accepted delivery of said palm oil, and said Manhattan Lighterage Corporation, acting for and in behalf of said Erie Railroad Company transported said palm oil by tank barge from said Pier 36 to the rail terminal of said Erie Railroad Company at Long Dock, Jersey City, in the State of New Jersey and at said Long Dock said Manhattan Lighterage Corporation pumped said palm oil into certain railway tank cars, bearing the initials and numbers, TPCX 102, SHPX 9109, SHPX 9101, SHPX 9116, and SHPX 9118; that thereafter said common carriers transported said shipment of palm oil loaded in and upon said railway tank cars, as aforesaid, over said connecting railway line, and in and through the District of New Jersey and within the jurisdiction of this Court, to said Jeffersonville, and did deliver said shipment at said Jeffersonville to said

defendant and did collect freight charges in the amount of $1,209.20 based only upon the aforesaid rate of 40 cents per 100 pounds.

7. That the lawful freight charges applicable upon said ship-
51 ment under the aforesaid tariffs and schedules was $1,269.69 being the sum of said line haul rate of 40 cents per 100 pounds based on the aforesaid weight of, to wit, 302,300 pounds and said pumping charge of 2 cents per 100 pounds based upon the aforesaid weight of, to wit, 302,300 pounds.

8. That in accordance with said arrangement and agreement between said Erie Railroad Company and said Manhattan Lighterage Corporation said Erie Railroad Company did on, to wit, November 13, 1932, pay to said Manhattan Lighterage Corporation the sum of, to wit, $196.50 for the lightering by tank barge of said palm oil from said Pier 36 to said rail terminal of said Erie Railroad Company at said Long Dock and for the pumping of said palm oil from tank barge into said tank railway cars at said Long Dock, said sum of, to wit, $196.50 being based and computed at said rate of 6½ cents per 100 pounds.

9. That on, to wit, October 18, 1932, said Manhattan Lighterage Corporation, pursuant to an arrangement theretofore made with said defendant, and with intent secretly to assume and absorb for the benefit of said defendant said pumping charge of 2 cents per 100 pounds provided in said tariffs and schedules of rules, regulations, and charges at said New York Harbor, printed, published, and filed by said Erie Railroad Company as aforesaid, applicable upon said shipment of palm oil, paid to said Erie Railroad Company, the sum of $60.49, being at the rate of 2 cents per 100 pounds upon the aforesaid weight of, to wit, 302,300 pounds.

52 10. That said Manhattan Lighterage Corporation did assume and absorb, for the benefit and advantage of said defendant, said pumping charge of 2 cents per 100 pounds.

11. That said defendant through and by means of a device employed with purpose to have said Manhattan Lighterage Corporation absorb and assume said pumping charge of 2 cents per 100 pounds, for the benefit and advantage of said defendant, and thereby reduce said lawfully published and filed tariffs, rates, and charges, chargeable to said defendant, as aforesaid, and then and there well knowing the provisions of the aforesaid lawfully published and filed tariffs and schedules, and the premises aforesaid, on, to wit, October 18, 1932 unlawfully did knowingly solicit, accept, and receive from said Manhattan Corporation, a concession and discrimination in the amount of 2 cents on each 100 pounds of said palm oil which was transported from said New York Harbor to said Jeffersonville and in respect to said transportation, whereby said shipment of palm oil was transported by railroad as aforesaid at and for a rate of 40 cents per 100 pounds, which was less than said rates aggregating 42 cents per 100 pounds named in the tariffs and schedules published and filed as aforesaid.

12. And so the Grand Jurors aforesaid, upon their oaths aforesaid, do present and find that said Colgate-Palmolive-Peet Company, defendant aforesaid, in the District of New Jersey and within the jurisdiction of this court, at the time, in the manner and form and
53 through a device as aforesaid, unlawfully did knowingly solicit, accept, and receive a concession and discrimination in respect to the interstate transportation of property conducted by the common carriers aforesaid through said District of New Jersey, whereby said property was transported by said common carriers at a less rate than the published and applicable rate named in the tariffs published and filed as aforesaid; contrary to the statute in such case made and provided and against the peace and dignity of the United States.

54 COUNT 2

And the Grand Jurors aforesaid upon their oaths aforesaid, do further present:

* * * * * * *

4. That throughout said period said common carriers had printed and had published and had filed with the Interstate Commerce Commission schedules of tariffs of rates and charges which showed a joint rate and charge of said carriers for the transportation of palm oil, in carload lots, from said New York Harbor to said Jeffersonville, over said through railway route, of 40 cents per 100 pounds; that said schedules and tariffs providing said rate of 40 cents per 100 pounds further provided that said rate applied from points within free lighterage limits of said New York Harbor as provided for and in accordance with certain tariffs and schedules of rules, regulations and charges governing the acceptance and handling of freight at, and for all deliveries in, said New York Harbor, which said tariffs and schedules had been duly printed and had been published and had been filed with the Interstate Commerce Commission, by said New York, Susquehanna and Western Railroad Company; that said last mentioned tariffs and schedules provided and defined free lighterage and floatage limits in said New York Harbor to be:

North River:

New York side—Battery to 135th Street.

New Jersey side—National Storage Docks, Communipaw, to and including Fort Lee, N. J.

East River and Harlem River:

New York side—Battery to Jerome Avenue Bridge, including Harlem River side of Ward's and Randall's Islands.

55 Brooklyn side—From Pot Cove, Astoria, to and including Newtown and Dutch Kills Creeks, and points in Wallabout Canal, and to Hamilton Avenue Bridge, Gowanus Canal, and to and including 69th Street, South Brooklyn (Bay Ridge).

New York Bay:

"Points on north and east shore of Staten Island between Bridge Creek (Arlington) and Clifton, both inclusive, and including Shooter Island.

Points on the New Jersey shore of New York Bay and on the Kill von Kull between Constable Hook and Avenue C, Bayonne City, opposite Port Richmond, S. I.:

that said last mentioned tariffs and schedules further provided that property therein specified as articles "not lighterage free", including palm oil, when loaded in tank cars, would be accorded free floatage privilege in lots of six cars or over, or when loaded in less than six cars, provided the total weight of shipments equaled or exceeded 240,000 pounds; that said last mentioned tariffs and schedules further provided that when such articles therein designated as "not lighterage free", including palm oil, in lots of 240,000 pounds, were handled in tank barges in lieu of tank cars on floats from alongside steamship and other points in said free lighterage and floatage limits in said New York Harbor, the transfer from barges to tank cars would be at the expense of the shipper, for which service a charge of 2 cents per 100 pounds would be made in addition to the rate from New York; that said rate of 40 cents per 100 pounds and said pumping charge of 2 cents per 100 pounds, were the lawful rates and the only lawful rates applicable on the shipment of palm oil hereinafter described.

56

COUNT 3

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs numbered 1, 2, 3, 4, and 5 of the second count of this indictment which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

57

COUNT 4

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs numbered 1, 2, 3, 4, and 5 of the second count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

58

COUNT 5

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs numbered 1, 2, 3, 4, and 5 of the second count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

59 COUNT 6

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

1. The facts set forth in paragraphs numbered 1, 2, 3, 4, and 5 of the second count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

60 COUNT 7

And the Grand Jurors aforesaid upon their oaths aforesaid, do further present:

* * * * * * *

3. That throughout said period said common carriers had printed and had published and had filed with the Interstate Commerce Commission schedules of tariffs of rates and charges which showed a joint rate and charge of said carriers for the transportation of cocoanut oil, in carload lots, from said New York Harbor to said Milwaukee, over said through railway route, of 40 cents per 100 pounds; that said schedules and tariffs providing said rate of 40 cents per 100 pounds further provided that said rate applied from points within free lighterage limits of said New York Harbor as provided for and in accordance with certain tariffs and schedules of rules, regulations and charges governing the acceptance and handling of freight at, and for all deliveries in, said New York Harbor, which said tariffs and schedules had been duly printed and had been published and had been filed with the Interstate Commerce Commission, by said Lehigh Valley Railroad Company; that said last mentioned tariffs and schedules provided and defined free lighterage and floatage limits in said New York Harbor to be:

North River:

New York side—Battery to 135th Street.

New Jersey side—National Storage Docks, Communipaw, to and including Fort Lee, N. J.

East River and Harlem River:

New York side—Battery to Jerome Avenue Bridge, including Harlem River side of Ward's and Randall's Islands.

Brooklyn side—From Pot Cove, Astoria, to and including

61 Newtown and Dutch Kills Creeks, and points in Wallabout Canal, and to Hamilton Avenue Bridge, Gowanus Canal, and to and including 69th Street, South Brooklyn (Bay Ridge).

New York Bay:

Points on north and east shore of Staten Island between Bridge Creek (Arlington) and Clifton, both inclusive, and including Shooter Island.

Points on the New Jersey shore of New York Bay and on the Kill von Kull between Constable Hook and Avenue C, Bayonne City, opposite Port Richmond, S. I.:

that said last mentioned tariffs and schedules further provided that property therein specified as articles "not lighterage free," including cocoanut oil, when loaded in tank cars, would be accorded free floatage privilege in lots of six cars or over, or when loaded in less than six cars, provided the total weight of shipments equaled or exceeded 240,000 pounds; that said last mentioned tariffs and schedules further provided that when such articles therein designated as "not lighterage free," including cocoanut oil, in lots of 240,000 pounds, were handled in tank barges in lieu of tank cars on floats from alongside steamship and other points in said free lighterage and floatage limits in said New York Harbor, the transfer from barges to tank cars would be at the expense of the shipper, for which service a charge of 2 cents per 100 pounds would be made in addition to the rate from New York; that said rate of 40 cents per 100 pounds and said pumping charge of 2 cents per 100 pounds, were the lawful rates and the only lawful rates applicable on the shipment of cocoanut oil hereinafter described.

62 COUNT 8

And the Grand Jurors aforesaid upon their oaths aforesaid, do further present:

* * * * * * * *

4. That throughout said period said common carriers had printed and had published and had filed with the Interstate Commerce Commission schedules of tariffs of rates and charges which showed a joint rate and charge of said carriers for the transportation of palm oil, in carload lots, from said New York Harbor to said Jeffersonville, over said through railway route, of 40 cents per 100 pounds; that said schedules and tariffs providing said rate of 40 cents per 100 pounds further provided that said rate applied from points within free lighterage limits of said New York Harbor as provided for and in accordance with certain tariffs and schedules of rules, regulations, and charges governing the acceptance and handling of freight at, and for all deliveries in, said New York Harbor, which said tariffs and schedules had been duly printed and had been published and had been filed with the Interstate Commerce Commission, by said Lehigh Valley Railroad Company; that said last mentioned tariffs and schedules provided and defined free lighterage and floating limits in said New York Harbor to be:

North River:
New York side—Battery to 135th Street.
New Jersey side—National Storage Docks, Communipaw, to and including Fort Lee, N. J.
East River and Harlem River:
New York side—Battery to Jerome Avenue Bridge, including Harlem River side of Ward's and Randall's Islands.

Brooklyn side—From Pot Cove, Astoria, to and including Newtown and Dutch Kills Creek, and points in Wallabout Canal, and to Hamilton Avenue Bridge, Gowanus Canal, and to and including 69th Street, South Brooklyn (Bay Ridge).

63 New York Bay:

Points on north and east shore of Staten Island between Bridge Creek (Arlington) and Clifton, both inclusive, and including Shooter Island.

Points on the New Jersey shore of New York Bay and on the Kill von Kull between Constable Hook and Avenue C, Bayonne City, opposite Port Richmond, S. I.;

that said last mentioned tariffs and schedules further provided that property therein specified as articles "not lighterage free," including palm oil, when loaded in tank cars, would be accorded free floatage privilege in lots of six cars or over, or when loaded in less than six cars, provided the total weight of shipments equaled or exceeded 240,000 pounds; that said last mentioned tariffs and schedules further provided that when such articles therein designated as "not lighterage free," including palm oil, in lots of 240,000 pounds, were handled in tank barges in lieu of tank cars on floats from alongside steamship and other points in said free lighterage and floatage limits in said New York Harbor, the transfer from barges to tank cars would be at the expense of the shipper, for which service a charge of 2 cents per 100 pounds would be made in addition to the rate from New York; that said rate of 40 cents per 100 pounds and said pumping charge of 2 cents per 100 pounds, were the lawful rates and the only lawful rates applicable on the shipment of palm oil hereinafter described.

64 COUNT 9

And the Grand Jurors aforesaid upon their oaths aforesaid, do further present:

* * * * * * *

4. That throughout said period said common carriers had printed and had published and had filed with the Interstate Commerce Commission schedules of tariffs of rates and charges which showed a joint rate and charge of said carriers for the transportation of palm oil, in carload lots, from said New York Harbor to said Jeffersonville, over said through railway route, of 40 cents per 100 pounds; that said schedules and tariffs providing said rate of 40 cents per 100 pounds further provided that said rate applied from points within free lighterage limits of said New York Harbor as provided for and in accordance with certain tariffs and schedules of rules, regulations, and charges governing the acceptance and handling of freight at, and for all deliveries in, said New York Harbor, which said tariffs and schedules had been duly printed and had been published and had been filed with the Interstate Commerce Commission, by said The New York Central Railroad Company; that said last men-

ned tariffs and schedules provided and defined free lighterage and atage limits in said New York Harbor to be:

North River:

New York side—Battery to 135th Street.

New Jersey side—National Storage Docks, Communipaw, to and including Fort Lee, N. J.

East River and Harlem River:

New York side—Battery to Jerome Avenue Bridge, including Harlem River side of Ward's and Randall's Islands.

Brooklyn side—From Pot Cove, Astoria, to and including Newtown and Dutch Kills Creeks, and points in Wallabout Canal, and to Hamilton Avenue Bridge, Gowanus Canal, and to and including 69th Street, South Brooklyn (Bay Ridge).

New York Bay:

Points on north and east shore of Staten Island between Bridge Creek (Arlington) and Clifton, both inclusive, and including Shooter Island.

Points on the New Jersey shore of New York Bay and on the Kill von Kull between Constable Hook and Avenue C, Bayonne City, opposite Port Richmond, S. I.:

t said last mentioned tariffs and schedules further provided that perty therein specified as articles "not lighterage free," including m oil, when loaded in tank cars, would be accorded free floatage vilege in lots of six cars or over, or when loaded in less than six s, provided the total weight of shipments equaled or exceeded ,000 pounds; that said last mentioned tariffs and schedules fur- r provided that when such articles therein designated as "not hterage free," including palm oil, in lots of 240,000 pounds, were ndled in tank barges in lieu of tank cars on floats from alongside amship and other points in said free lighterage and floatage limits said New York Harbor, the transfer from barges to tank cars uld be at the expense of the shipper, for which service a charge 2 cents per 100 pounds would be made in addition to the rate m New York; that said rate of 40 cents per 100 pounds and said nping charge of 2 cents per 100 pounds, were the lawful rates l the only lawful rates applicable on the shipment of palm oil einafter described.

COUNT 10

And the Grand Jurors aforesaid upon their oaths aforesaid, do ther present:

* * * * * * *

That throughout said period said common carriers had printed l had published and had filed with the Interstate Commerce Commsion schedules of tariffs of rates and charges which showed a joint and charge of said carriers for the transportation of palm oil,

in carload lots, from said New York Harbor to said Jeffersonville, over said through railway route, of 40 cents per 100 pounds; that said schedules and tariffs providing said rate of 40 cents per 100 pounds further provided that said rate applied from points within free lighterage limits of said New York Harbor as provided for and in accordance with certain tariffs and schedules of rules, regulations and charges governing the acceptance and handling of freight at, and for all deliveries in, said New York Harbor, which said tariffs and schedules had been duly printed and had been published and had been filed with the Interstate Commerce Commission, by said The Delaware, Lackawanna and Western Railroad Company; that said last mentioned tariffs and schedules provided and defined free lighterage and floatage limits in said New York Harbor to be:

North River:

New York side—Battery to 135th Street.

New Jersey side—National Storage Docks, Communipaw, to and including Fort Lee, N. J.

67 East River and Harlem River.

New York side—Battery to Jerome Avenue Bridge, including Harlem River side of Ward's and Randall's Islands. dall's Islands.

Brooklyn side—From Pot Cove, Astoria, to and including Newtown and Dutch Kills Creeks, and points in Wallabout Canal, and to Hamilton Avenue Bridge, Gowanus Canal, and to and including 69th Street, South Brooklyn (Bay Ridge).

New York Bay:

Points on north and east shore of Staten Island between Bridge Creek (Arlington) and Clifton, both inclusive, and including Shooter Island.

Points on the New Jersey shore of New York Bay and on the Kill von Kull between Constable Hook and Avenue C, Bayonne City, opposite Port Richmond, S. I.:

that said last mentioned tariffs and schedules further provided that property therein specified as articles "not lighterage free," including palm oil, when loaded in tank cars, would be accorded free floatage privilege in lots of six cars or over, or when loaded in less than six cars, provided the total weight of shipments equaled or exceeded 240,000 pounds; that said last mentioned tariffs and schedules further provided that when such articles therein designated as "not lighterage free," including palm oil, in lots of 240,000 pounds, were handled in tank barges in lieu of tank cars on floats from alongside steamship and other points in said free lighterage and floatage limits in said New York Harbor, the transfer from barges to tank cars would be at the expense of the shipper, for which service a charge of 2 cents per 100 pounds would be made in addition to the rate from New York; that said rate of 40 cents per 100 pounds and said pumping

harge of 2 cents per 100 pounds, were the lawful rates and the only awful rates applicable on the shipment of palm oil hereinafter described.

In United States District Court, District of New Jersey

UNITED STATES OF AMERICA

vs.

COLGATE-PALMOLIVE-PEET COMPANY

Motion to quash

Filed July 19, 1934

And now comes the defendant herein by Wall, Haight, Carey & Hartpence, its attorneys, and says that the indictment herein and each and every count thereof are not sufficient in law to require the defendant to plead thereto, and this defendant moves the Court to quash the indictment and each and every count thereof, and for special reasons shows unto the Court the following:

1. The tariffs and schedules referred to in all the counts of the indictment provided as follows:

"Property loaded in tank cars will be accorded free floatage privileges in lots of six cars or over, and when loaded in less than six cars provided the total weight of shipment exceeds or equals 240,000 pounds.

"When ordered by the shipper or consignee in writing, and tank barges are available, vegetable oils * * * in lots of 240,000 pounds or more, may be handled in tank barges in lieu of tank cars on floats from or to alongside steamship and points within free lighterage limits of New York Harbor. Transfer from barges to tank cars or from tank cars to barges to be at expense of shipper or consignee, for which service a charge of 2 cents per 100 pounds will be made in addition to the rates from or to New York."

That is to say, said tariffs and schedules did not provide for or require said service charge of 2¢ per hundred pounds for transferring oil from tank barges to tank cars, or the payment thereof by any shipper or consignee, unless the handling of the oils so pumped within free lighterage limits of New York Harbor in tank barges, in lieu of tank cars on floats, had been ordered in writing, by the shipper or the consignee thereof, so that in the absence of such a written order payment of such charge on behalf of a shipper or consignee by any other person, whatsoever, did not constitute the payment of any sum required to be paid by such shipper or consignee for transportation of oil by any tariff or schedule published and filed with the Interstate Commerce Commission, and such payment did not constitute a rebate or concession from any rate established by such tariff or schedule or a discrimination with respect to any such rate.

It is not alleged in any count in the indictment either that this defendant as shipper, or that the consignee gave such order in writing as aforesaid with respect to the handling of the oil mentioned in any count thereof.

Wherefore, this defendant respectfully prays that the indictment be quashed and held for nought.

WALL, HAIGHT, CAREY & HARTPENCE.
Attorneys for Defendant,
Colgate-Palmolive-Peet Company.

70 [File endorsement omitted.]

71 [Clerk's certificate to foregoing papers, omitted in printing.]

72 In United States District Court, District of New Jersey

On Motion to Quash Indictment No. 6821–b

UNITED STATES OF AMERICA

vs.

DURKEE FAMOUS FOODS, INC., DEFENDANT

Appearances: Harlan Besson, Esq., United States Attorney. Daniel H. Kunkel, Esq., Special Assistant United States Attorney. Burt L. Smelker, Esq., Attorney for Interstate Commerce Commission, opposed. Roger Hinds, Esq., Attorney for Durkee Famous Foods, Inc., for the motion.

Memorandum

Filed Jan. 14, 1937

FAKE, District Judge:

The indictment here is intended to charge an offense against the provisions of Section 1 of the Elkins Act, Sec. 41, Title 49, U. S. C. A. The gist of the issue before me resides in the allegation in the indictment that the defendant "through a device aforesaid, unlawfully did knowingly solicit, accept, and receive a concession and discrimination in respect to interstate transportation of property * * *

73 whereby said property was transported by said common carriers at a less rate than the published an applicable rate named in the tariffs published and filed as aforesaid; contrary to the statute in such case made and provided."

Section 41 of the Act makes it a criminal offense to "accept or receive any rebate concession, or discrimination in respect to transportation of any property * * * whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier."

The indictment discloses that the rate involved is 40 cents per hundred pounds and in addition thereto a charge of 2 cents per 100 pounds, referred to as a pumping charge. The issue here is based entirely on the 2 cent pumping charge. On this point the indictment reads as follows: "That said defendant did assume and absorb, for

he benefit and advantage of said Durkee Famous Foods, Inc., said umping charge of 2 cents per 100 pounds."

This leads to an examination of the rule or tariff for the purpose of ecertaining when and under what circumstances the 2 cent pumping harge may become effective. By stipulation in writing between the parties it is agreed that the item for pumping arises if at all under a rule reading as follows:

"Property loaded in tank cars will be accorded free floatage rivileges in lots of six cars or over, or when loaded in less than six ars provided the total weight of shipment exceeds or equals 240,000 ounds.

"When ordered by the shipper or consignee, in writing, and tank arges are available, Vegetable Oils, Foots, Settlings and Tank Bot-oms and Fish, Sea Animal, Whale Oils, Linseed Oil, and Molasses lots of 240,000 pounds or more, may be handled in tank barges in eu of tank cars on floats from or to alongside steamship and points ithin free lighterage limits of New York Harbor. Transfer from arges to tank cars or from tank cars to barges to be at expense of ipper or consignee for which service a charge of 2 cents per 100 ounds will be made in addition to the rates from or to New York."

It should be noted that while the indictment is found under the lkins Act, the crime involved is not fully defined in that Act. We e compelled to look elsewhere for the factors which lead to a com-ete definition. We find these factors in the filed tariff (rule) and for esent purposes they have the same force and effect as statutory ovisions. Looking then to the tariff, it will be seen, among other ings, that the 2 cent charge does not become effective unless tank arges are "* * * ordered by the shipper or consignee, in writing, d tank barges are available, * * *." These requirements are nditions precedent to the right to bill or assess the 2 cent charge.

It, therefore, follows that no criminal concession or discrimination can be spelled out under the Elkins Act when read with the tariff unless these essential conditions are met in the lan-age of the indictment. The indictment is silent on that subject, erefore, it charges no crime and the motion to quash must be anted. See United States v. Cook, 84 U. S. 186; Davis v. Hender-n, 266 U. S. 92; U. S. v. Olds Motor Works, 4 Fed. Supp. 65; and United States v. Wood, 159 Fed. 187.

[File endorsement omitted.]

In United States District Court, District of New Jersey

On Motion to Quash Indictment No. 6821-B

UNITED STATES OF AMERICA

vs.

DURKEE FAMOUS FOODS, INC., DEFENDANT

Appearances: Harlan Besson, Esq., United States Attorney. Dan-H. Kunkel, Esq., Special Assistant United States Attorney. Burt

L. Smelker, Esq., Attorney for Interstate Commerce Commissio
Opposed. Roger Hinds, Esq., Attorney for Durkee Famous Foo
Inc., for the motion.

Memorandum correcting and amending a memorandum filed in thi cause on January 14, 1937

Filed Jan. 25, 1937

FAKE, District Judge:

The memorandum filed by me in the above entitled cause on the 14t day of January 1937 is hereby corrected and amended as follow Strike out the paragraph on page 2 of the aforesaid memorandu which reads as follows:

"The indictment discloses that the rate involved is 40 cents p hundred pounds and in addition thereto a charge of 2 cents per 1 pounds, referred to as a pumping charge. The issue here is base entirely on the 2 cent pumping charge. On this point the indictme reads as follows: 'That said defendant did assume and absorb for th benefit and advantage of said Durkee Famous Foods, Inc., said pump ing charge of 2 cents per 100 pounds.'"

And insert in lieu thereof, the following paragraph:

78 The indictment discloses that the rate involved is 40 cents p hundred pounds and in addition thereto a charge of 2 cents p 100 pounds, referred to as a pumping charge. The issue here is ba entirely on the 2 cent pumping charge. On this point the indictme reads as follows: "That said Manhattan Lighterage Company di assume and absorb, for the advantage of said defendant, said pump ing charge of 2 cents per 100 pounds."

79 [File endorsement omitted.]

80 [Clerk's certificate to foregoing papers omitted in printing.

81 Supreme Court of the United States

Stipulation re enlargement of record, etc.

A motion of defendant-appellee to enlarge the record in this mat ter by adding thereto:

1. Memorandum opinion of the United States District Court file January 14, 1937, in United States vs. Durkee Famous Foods, In (No. 6821-b), supporting the order referred to in the plea in bar an answer herein quashing the previous indictment herein (Crimina No. 6817-b).

2. Correcting memorandum opinion of said United States Distric Court filed January 25, 1937, correcting the above mentioned opinio (Criminal No. 6821-b).

3. Motion to quash said previous indictment, filed on or about July 19, 1934 (Criminal No. 6817-b), referred to in the plea in bar an answer herein.

4. Prior indictment herein said United States District Court re turned and filed at the April 1934 term of said District Cour (Criminal No. 6817-b).

having been granted by the Court without objection of the Solicitor General, it is hereby

Stipulated, that in so far as the said prior indictment is concerned only the following parts need be printed:

(a) The first count in full;

(b) Paragraph "4" of Counts 2, 8, 9 and 10.

82 (c) Paragraph "1" of Counts 3, 4, 5, and 6.

(d) Paragraph "3" of Count 7.

and it is further

Stipulated, that the said first count is typical of all of the counts of said prior indictment.

Dated Newark, N. J., November 28, 1938.

ROBERT H. JACKSON.
Solicitor General of the United States.

JOHN A. HARTPENCE,
Counsel for Appellee, Colgate-Palmolive-Peet Company.

83 In the Supreme Court of the United States

Statement of points and designation of record to be printed

Filed Aug. 30, 1938

I

United States of America, appellant, states that in its brief and oral argument on its appeal in the above-entitled cause it will rely upon the points stated in its assignment of errors therein.

II

The entire record in this cause as filed in this Court is necessary for consideration of the points stated by appellant, and the entire transcript of record as transmitted by the Clerk of the District Court should be printed by the Clerk of this Court.

ROBERT H. JACKSON,
Robert H. Jackson,
Solicitor General.

AUGUST —, 1938.

Service of a copy of the above Statement of Points and Designation of Record to be Printed acknowledged August 24, 1938.

WALL, HAIGHT, CASEY & HARTPENCE.
Counsel for Appellee.

[File endorsement omitted.]

[Endorsed on cover:] Enter: Attorney General. File No. 42,796. New Jersey, D. C. U. S. Term No. 311. The United States of America, Appellant vs. Colgate-Palmolive-Peet Company. Filed August 30, 1938. Term No. 311 O. T. 1938.

U. S. GOVERNMENT PRINTING OFFICE: 1938

FILE COPY

[redacted]

[redacted]

In the Supreme Court of the United States

[redacted]

THE UNITED STATES OF AMERICA, APPELLANT

v.

COLGATE-PALMOLIVE-PEET COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW JERSEY

STATEMENT AS TO JURISDICTION

n the District Court of the United States for the District of New Jersey

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CRIMINAL No. 7920–B.

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

COLGATE-PALMOLIVE-PEET COMPANY, A CORPORATION, DEFENDANT

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, United States of America submits herewith its statement showing the basis of jurisdiction of the Supreme Court of the United States to entertain an appeal in this cause.

A. The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment complained of is conferred by Title 18, Section 682, of the United States Code, otherwise known as the Criminal Appeals Act, and by Section 345, Title 28, of the United States Code.

B. The statute of the United States, the construction of which is involved herein is the Act of

May 10, 1934, c. 278, 48 Stat. 772 (U. S. C. Title 18, Sec. 587) which provides so far as pertinent:

> Whenever an indictment is found defective or insufficient for any cause, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned at any time during the next succeeding term of court following such finding, during which a grand jury thereof shall be in session.

C. The judgment of the District Court sought to be reviewed was entered on June 28, 1938. The application for appeal was filed on July —, 1938, and the appeal was allowed on July —, 1938.

D. The indictment is in five separate counts, each of which is based on Section 1 of the Elkins Act, U. S. C. Title 49, Sec. 41 (1), and alleges that on a specified date the defendant knowingly solicited, accepted, and received a concession of 2 cents per 100 pounds in respect of the interstate transportation of vegetable oil by certain specified common carriers by railroad, whereby the oil was transported at a less rate than that named in the carriers' published tariffs. Four of the offenses are alleged to have occurred on July 23, 1932, and the fifth on September 26, 1932.

A prior indictment charging the same offenses had been returned at the April term of Court in 1934, to which a motion to quash was filed in April, 1935, and sustained by judgment entered March 15,

937, during the January 1937 term of Court.[1] At
ne same term the Government (invoking the Act
f May 10, 1934, U. S. C. Title 18, Sec. 587) re-
resented the case on March 16, 1937, to the grand
ury empaneled for and in session during the Janu-
ry term at Trenton, New Jersey, and the grand
ury returned the new indictment on April 9, 1937,
that term, which had been extended by order of
ne Court. The next succeeding term of court for
ne District of New Jersey was fixed by law to be
eld beginning April 6, 1937 (the first Tuesday in
pril), at Newark, New Jersey (U. S. C. Title 28,
ec. 176).

To this new indictment of April 9, 1937, the
efendant filed on June 18, 1937, a pleading desig-
ated as a "Plea in Bar," alleging (1) that as the
ffenses charged were committed more than three
ears preceding the return of the indictment, prose-
ution was barred by the statute of limitations
U. S. C. Title 18, Sec. 582); (2) that the new in-
ictment was not returned in conformity with the
ct of May 10, 1934 (U. S. C. Title 18, Sec. 587),
ecause it was returned at the same term and not
the term next succeeding the term at which the

[1] Thus, almost three years had passed between the return
the prior indictment and the date on which it was quashed,
nd approximately four and a half years between the com-
ission of the offenses and the quashing of the indictment.
ut for the Act of May 10, 1934 (U. S. C. Title 18, Sec. 587),
e statute of limitations (U. S. C. Title 18, Sec. 582) would
ve barred re-indictment.

prior indictment was found defective; and (3) that the order quashing the prior indictment was appealable under the Criminal Appeals Act (U. S. C. Title 18, Sec. 682) and that, therefore, the Act of May 10, 1934, had no application to that order. The pleading concludes with the following:

> All of which said defendant, Colgate-Palmolive-Peet Company, a corporation, is ready and willing to verify, and therefore pleads the same in bar of any prosecution or punishment under said indictment or any count thereof, and says that to prosecute or punish it thereunder for any of the alleged offenses charged therein is contrary to the provisions of the statute of limitations, 18 U. S. Code, section 582.
>
> WHEREFORE, the defendant prays judgment that the said alleged indictment be not further prosecuted against it, and that by this court it may be dismissed and discharged from the said premises without day and the said alleged indictment be held for naught and quashed.

On June 28, 1938, the court entered judgment ordering,

> that the said Plea in Bar to said indictment herein be and the same is hereby sustained, and that said indictment be not further prosecuted against said defendant, and that said indictment be and the same is hereby accordingly dismissed, discharged, held for naught and quashed.

Construing the Act of May 10, 1934, the court's opinion holds that the language of the Act,

> leads to the inescapable conclusion that where an indictment has been found to be defective after the passage of the prescribed period of limitation, the one and only Grand Jury which can hand down a new indictment is that Grand Jury which is authorized to act at the term next succeeding the term at which the Court found the indictment to be defective; and it appearing, as it does here, that the indictments under review were not found by a Grand Jury authorized as aforesaid, the indictments must necessarily fall.

On the date this judgment was entered the "term next succeeding the term at which the Court found the (prior) indictment to be defective" had of course expired.

Although the Criminal Appeals Act provides for a direct appeal to the Supreme Court "From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy," the application of that provision to the judgment in this case is not entirely clear, (1) because it is uncertain whether the pleading sustained by the judgment is "a special plea in bar," the prayer thereof being, among other things, that the indictment be "held for naught and quashed," and the judgment being not only that the "Plea in Bar" be sustained but also that the indictment be "dismissed, discharged, held for naught and

quashed," and (2) the ruling of the court is not of such nature as to bar forever prosecution of the offenses, but, instead, recognizes the right of the Government to prosecute further at the term of court next succeeding the term at which the Court found the prior indictment to be defective. (Compare *United States* v. *Thompson,* 251 U. S. 407, 412; *United States* v. *Storrs,* 272 U. S. 652.)

The right to appeal, however, is clear, we think, under the language of the Act which provides for an appeal "From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded."

It is true that the statute here construed (U.S.C. Title 18, Sec. 587) is not the statute which prescribed the substantive offenses charged in the indictment. However, Section 587 must be regarded as being as much a part of the statute (the Elkins Act) prescribing the offenses as if it were expressly written into the latter Act, because, but for that Section, the Government would have had no right whatever to seek the new indictment. Therefore, Section 587 would necessarily appear to be a part of the statute upon which the indictment is founded, and it would do no violence to language to so consider it.

If the Elkins Act, which prescribed the offenses charged, had contained in its own language a defi-

nite statute of limitations but had also directed that the limitation should be suspended under certain circumstances, which is the only effect of Section 587, there clearly could be no question but that a decision or judgment holding that the suspension of the limitation provision did not apply in certain circumstances would be a "decision or judgment * * * based upon the * * * construction of the statute upon which the indictment is founded."

E. The question presented is substantial. Section 587 is a statute of general application which was enacted for the purpose of circumventing the efforts of defendants to delay prosecution through resort to dilatory motions until the statute of limitations had barred re-indictment. (Report of Judiciary Committee, Congressional Document 9769, Senate Report 405, 73d Cong., 1st Sess.) The construction of the Act by the District Court interposes an interim of wholly unnecessary and illogical delay in the re-indictment of defendants under this Act, during which interim prosecution would become more difficult through the disappearance or death of witnesses, the vanishing of evidence, and the staleness of the crime, which always result from the passage of time. It is clearly of public importance that after an indictment is quashed the Government be permitted to seek a new indictment at the earliest possible opportunity consistent with the availability of a grand jury. There are no other court decisions on the question here pre-

sented, and it is highly important in the enforcement of Federal criminal statutes generally, that the question be settled by the Supreme Court.

F. If the judgment of the District Court be regarded as one sustaining a special plea in bar, the following decisions support the jurisdiction of the Supreme Court:

United States v. *Celestine,* 215 U. S. 278;
United States v. *Barber,* 219 U. S. 72;
United States v. *Oppenheimer,* 242 U. S. 85;
United States v. *Thompson,* 251 U. S. 407.

If the judgment of the District Court quashing and setting aside the indictment was based upon that Court's construction of the statute upon which the indictment was founded, the following decisions sustain the jurisdiction of the Supreme Court:

United States v. *Keitel,* 211 U. S. 370;
United States v. *Sprague,* 282 U. S. 716;
United States v. *Hastings,* 296 U. S. 188;
United States v. *Curtiss-Wright Corp.,* 299 U. S. 304.

A copy of the opinion of the District Court is appended hereto.

Respectfully submitted.

N. A. TOWNSEND,
Acting Solicitor General.
JOHN J. QUINN,
United States Attorney.

JULY 1938.

In the District Court of the United States for the District of New Jersey

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CRIMINAL No. 7918b

UNITED STATES OF AMERICA

v.

DURKEE FAMOUS FOODS, INC.

CRIMINAL No. 7919b

UNITED STATES OF AMERICA

v.

MANHATTAN LIGHTERAGE CORPORATION

CRIMINAL No. 7920b

UNITED STATES OF AMERICA

v.

COLGATE-PALMOLIVE-PEET COMPANY

(On defendants' pleas in bar to indictments.)

Newark, N. J., Tuesday, June 14, 1938

Before Hon. GUY L. FAKE, U. S. D. J.

Appearances: Daniel H. Kunkel, Esq., Special Assistant to the United States Attorney, for the Government. Roger Hinds, Esq., for defendant Durkee Famous Foods, Inc. Frank M. Swacker, Esq., for defendant Manhattan Literage Corpora-

tion. Messrs. Wall, Haight, Carey & Hartpence, by John A. Hartpence, Esq. and Alfred F. Conway, Esq., for defendant Colgate-Palmolive-Peet Company.

W. W. HEIRONIMUS,
Official Reporter.

The COURT (orally, at close of argument): The issues here arise on three indictments, to each of which pleas in bar have been filed. This memorandum will be dispositive of the three cases.

The defendants were indicted on the 9th of April, 1937, for alleged violations of the Elkins Act, Title 49, Section 41.

The acts complained of in the indictments having been committed, according to the dates set forth therein, more than three years prior to the filing of the indictments, Section 582 of Title 18 of the U. S. Code provides as follows:

> No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in Section 584 of this Title, unless the indictment is found or action is instituted within three years next after such offense shall have been committed.

It is contended for the Government that the pleas should not be sustained because Section 587 of Title 18 of the U. S. Code provides as follows:

> Whenever an indictment is found defective or insufficient for any cause after the period prescribed and the applicable Statute of Limitations has expired, a new indict-

ment may be returned at any time during the next succeeding term of Court following such finding, during which the Grand Jury thereof shall be in session.

It is urged that a reasonable and proper con-leration of this section causes it to become effec-e as to the then existing term of Court, notwith-nding the fact that the statute itself is silent as the then existing term. (Citing Endlich on In-rpretation of Statutes, pages 599 etc. *U. S.* v. *Y. Central Railroad,* 212 U. S. 509; *U. S.* v. *enig Coal Co.,* 270 U. S. 512; *U. S.* v. *Baltimore st Co.,* 2 Fed. (2d) 761, affirmed 268 U. S. 388; *awa* v. *U. S.,* 260 U. S. 178.)

Counsel for the defendants argue that to so con-ue the statute would cause the Court to enter the nere of the legislature and in effect amend the t to read as follows:

> A new indictment may be returned at any time during the next succeeding term of court, following such finding, during which the Grand Jury thereof shall be in session and *as well at the Term in which the indictment is found defective.*

Moreover, it is urged that Section 587 must be ictly construed because it is an exception to the tute of Limitations.

Other arguments are offered by counsel for the fense, which appear in defendants' briefs. They e the following cases to sustain their position: *S.* v. *Sheldon,* 2 Wheaton 119–121 and 122;

U. S. v. *McElvaine,* 272 U. S. 633 at 639; *U. S.* v. *Scherton,* 285 U. S. 518 at 521–2; 16 Corpus Juris 228, Section 350.

The indictments were returned by a Grand Jury sitting for the January Term of Court on April 9, 1937, but within the time fixed by law for the April Term of Court at Newark, the January Term having been extended by an order of the Court.

At the time the previous indictments were quashed by this Court, the three-year Statute of Limitations had then run against the alleged offenses.

Newark, N. J., Monday, June 27, 1938

(Hearing continued from June 14, 1938. Same appearances.)

The COURT (orally, at close of argument): At the last session, I stated the facts and raised the issues upon which counsel have appeared before me today. Both sides have been diligent in their endeavors to assist the Court in ascertaining the law to be followed here. No cases have been discovered bearing upon a construction of the section of the Statute of Limitations which is here involved. This has resulted in much research in an endeavor to find an analogous situation, and upon careful consideration of the arguments presented by counsel, as well as a consideration of the cases they have cited, it is my conclusion that the Court, being without power to amend the statute involved, and it appearing that the statute itself contains no am-

biguity, either patent or latent, must give to the statute the generally accepted meaning of the language used therein. This leads to the inescapable conclusion that where an indictment has been found to be defective after the passage of the prescribed period of limitation, the one and only Grand Jury which can hand down a new indictment is that Grand Jury which is authorized to act at the term next succeeding the term at which the Court found the indictment to be defective; and it appearing, as it does here, that the indictments under review were not found by a Grand Jury authorized as aforesaid, the indictments must necessarily fall.

The pleas in bar are therefore sustained.

United States District Court, District of New Jersey. *United States of America, Plaintiff,* v. *Colgate-Palmolive-Peet Co.,* a corporation, Defendant. Criminal No. 7920b. Statement as to jurisdiction. John J. Quinn, U. S. Attorney. Filed July 25, 1938. At 11 o'clock a. m. Benjamin F. Harvey, clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1938

FILE COPY

Office - Supreme Court, U. S.
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CLERK

No. 311

In the Supreme Court of the United States

OCTOBER TERM, 1938

THE UNITED STATES OF AMERICA, APPELLANT

v.

COLGATE-PALMOLIVE-PEET COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES

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CITATIONS

Case:

United States of America, Appellant v. *Durkee Famous Foods, Inc.*, No. 309, October Term, 1938 ..... 2, 8

115747—38

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 311

THE UNITED STATES OF AMERICA, APPELLANT

v.

COLGATE-PALMOLIVE-PEET COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 15–17) has not been reported.

JURISDICTION

The order of the District Court sustaining the plea in bar and dismissing, discharging, and quashing the indictment was entered June 28, 1938 (R. 17). The appeal to this Court was applied for and allowed on July 25, 1938 (R. 20). The jurisdiction of this Court is conferred by the Criminal

Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682) and by Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C., Title 28, Sec. 345). An order was entered by this Court on October 10, 1938, noting probable jurisdiction.

QUESTIONS PRESENTED

1. Whether Section 1 of the Act of May 10, 1934, which limits the operation of statutes of limitations and authorizes a new indictment where a prior indictment has been found defective or insufficient for any cause after the period of limitation provided by the applicable statute has expired, permits the new indictment to be returned at the same term of court during which the prior indictment is found defective.

2. Whether the application of the Act, in authorizing new indictments in the specified cases whenever prior indictments are found defective or insufficient "for any cause," is conditioned upon or affected by the nature of the ground upon which the prior indictment is quashed.

STATUTES INVOLVED

The statutes involved are printed in the Appendix to the Government's brief in *United States of America, Appellant* v. *Durkee Famous Foods, Inc.*, No. 309, October Term, 1938, wherein the identical questions here involved are discussed.

STATEMENT

On April 9, 1937, the grand jury empaneled for and in session during the January, 1937, term of the United States District Court for the District of New Jersey indicted the appellee in five counts charging violations of the Elkins Act (U. S. C., Title 49, Sec. 41 (1)). Each count of the indictment (R. 1) alleges that under the following circumstances the appellee unlawfully and knowingly solicited, accepted and received in July, September or October, 1932, a concession of 2 cents per 100 pounds in respect of the interstate transportation by certain railroad common carriers of a shipment of palm oil, whereby the oil was transported by the railroads at a less rate and charge than that named in their published schedules and tariffs.

The railroads published in their tariffs a line-haul rate of 40 cents per 100 pounds for the transportation of vegetable oils, including palm oil, from alongside steamships or vessels within the free lighterage or floatage limits of New York Harbor, N. Y., to Jeffersonville, Indiana. Their tariffs provided, in connection with the acceptance and handling of shipments to be transported at that rate, that property loaded in tank cars would receive free floatage within the Harbor when loaded in lots of six or more tank cars, or in less than six cars if the total weight of the entire shipment was 240,000 pounds or more. The tariffs also provided that shipments of palm oil in lots of 240,000 pounds

or more would be handled across the Harbor in tank barges in lieu of tank cars on floats when the barges were ordered by the shipper or consignee, "in writing," and were available, and that when tank barges were so used, the service of pumping and transferring the oil from the barges to tank cars would be at the expense of the shipper, for which service a charge of 2 cents per 100 pounds, would be made against the shipper in addition to the 40-cent line-haul rate (R. 1–2).

Appellee ordered, "in writing," from the railroad named in each count of the indictment, tank barges, in lieu of tank cars on floats, for the transfer of the specified shipments of imported palm oil from alongside steamships or vessels anchored in New York Harbor [and within the free lighterage and floatage limits of the Harbor] to the terminal of the railroad in New Jersey, and tendered the shipments to the railroad for transportation from the steamship to Jeffersonville, Indiana. The railroad accepted the shipments and, through its agent, Manhattan Lighterage Company [Count 1] or New York Tank Barge Co., Inc. [Counts 2, 3, 4, and 5] conveyed the shipments by tank barge from the steamship to the railroad terminal in New Jersey, where the agent pumped or transferred the oil from the barges to tank cars, and whence the railroads transported the shipments to Jeffersonville, Indiana. Appellee paid to the railroads *only* the line-haul rate of 40 cents per hundred pounds. The agent paid the railroad the 2-cent pumping

charge. Pursuant to a previous secret arrangement between the agent and the appellee, the appellee never paid any part of the tariff charge for the pumping service to the railroads or to the agent and, by that device, obtained the alleged concession of 2 cents per 100 pounds from the published tariff rate (R. 3).

A prior indictment based upon these facts and charging the same offenses had been returned at the April term of court in 1934 (R. 22). A motion to quash (R. 33) that indictment was sustained by opinion filed January 14, 1937 (R. 34) and judgment entered March 15, 1937 (R. 12), during the January 1937 term of court.[1] That indictment was quashed on the ground that it failed to allege the fact that appellee's request upon the railroad for tank barges was made "in writing" as required by the tariff rule, which had been laid before the court by stipulation (R. 34–35).

At the same term of court the Government, invoking the Act of May 10, 1934, re-presented the case to the grand jury empaneled for and in session during the January term, 1937, at Trenton, and that grand jury returned the new indictment on April 9, 1937, the January 1937 term having been extended by order of the court (R. 18). The new

[1] Thus, almost three years had passed between the return of the indictment and the date on which it was quashed. Meantime, the offenses having been committed in July, September, and October, 1932, the statutory period of limitation had expired and reindictment was barred but for the Act of May 10, 1934.

indictment in five counts contains the allegation that appellee's order for tank barges was made "in writing," thus curing the defect which the court found in the prior indictment.

To this new indictment of April 9, 1937, the appellee filed on June 18, 1937, a pleading designated as a "Plea in Bar," alleging (1) that as the offenses charged were committeed more than three years preceding the return of the indictment, prosecution was barred by the statute of limitations (U. S. C., Title 18, Sec. 582); (2) that the indictment was not returned in conformity with the Act of May 10, 1934, because it was returned at the same term and not at the term next succeeding the term at which the prior indictment was found defective; and (3) that the order quashing the prior indictment was appealable under the Criminal Appeals Act and that, therefore, the Act of May 10, 1934, had no application to that order (R. 11-13).

On June 28, 1938, the court entered judgment (R. 17) ordering—

> that the said Plea in Bar to said indictment herein be and the same is hereby sustained, and that said indictment be not further prosecuted against said defendant, and that said indictment be and the same is hereby accordingly dismissed, discharged, held for nought and quashed.

Construing the Act of May 10, 1934, the court's opinion (R. 17) held that the language of the Act—

leads to the inescapable conclusion that where an indictment has been found to be defective after the passage of the prescribed period of limitation, the one and only Grand Jury which can hand down a new indictment is that Grand Jury which is authorized to act at the term next succeeding the term at which the Court found the indictment to be defective; and it appearing, as it does here, that the indictments under review were not found by a Grand Jury authorized as aforesaid, the indictments must necessarily fall.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In sustaining the plea in bar.

2. In holding and adjudging that the statute of limitations had barred the prosecution of the offenses alleged in the several counts of the indictment.

3. In holding and adjudging that the Act of May 10, 1934 (U. S. C., Title 18, Sec. 587), did not limit the application of the statute of limitations (U. S. C., Title 18, Sec. 582) so as to permit the new indictment to be returned by the grand jury empaneled at and in session during the same term of court at which the prior indictment was found defective and insufficient.

4. In holding and adjudging that the Act of May 10, 1934 (U. S. C., Title 18, Sec. 587), was effective to stay the statute of limitations only where the new indictment is returned by a grand jury in session

during the next succeeding term of court following the term at which the prior indictment was found defective or insufficient.

5. In entering the order of June 28, 1938, sustaining the plea in bar and dismissing and quashing the indictment.

DISCUSSION

As this case presents the identical questions which are involved in the case of *United States of America, Appellant* v. *Durkee Famous Foods*, No. 309, October Term, 1938, the Court is respectfully referred to the Government's brief in the *Durkee* case for a discussion of the Government's contentions.

CONCLUSION

For the reasons stated in the Government's brief in the *Durkee* case, it is respectfully submitted that the judgment of the court below sustaining the plea in bar to the indictment in this case should be reversed.

ROBERT H. JACKSON,
Solicitor General.
THURMAN ARNOLD,
Assistant Attorney General.
ELMER B. COLLINS,
Special Assistant to the Attorney General.
W. MARVIN SMITH,
Attorney.
DANIEL H. KUNKEL,
Attorney, Interstate Commerce Commission.

DECEMBER 1938.

U. S. GOVERNMENT PRINTING OFFICE: 1938

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No. 311

Office - Supreme Court, U. S.
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

THE UNITED STATES OF AMERICA, *Appellant*

v.

COLGATE-PALMOLIVE-PEET COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

BRIEF FOR COLGATE-PALMOLIVE-PEET COMPANY.

ALBERT C. WALL,
THOMAS G. HAIGHT,
JOHN A. HARTPENCE,
MASON TROWBRIDGE,
Counsel for Appellee,
COLGATE-PALMOLIVE-PEET COMPANY.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1938

No. 311

THE UNITED STATES OF AMERICA, *Appellant*

v.

COLGATE-PALMOLIVE-PEET COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

BRIEF FOR COLGATE-PALMOLIVE-PEET COMPANY.

Statement.

As this case presents the identical questions which are involved in the case of *United States of America, Appellant v. Durkee Famous Foods*, No. 309, October Term, 1938, the Court is respectfully referred to the appellee's brief in the *Durkee* case, in which this appellee joins, for a discussion of this appellee's contentions.

Conclusion.

For the reasons stated in the appellee's brief in the *Durkee* case, it is respectfully submitted that the judgment

of the court below sustaining the plea in bar to the indictment in this case should be affirmed.

ALBERT C. WALL,
THOMAS G. HAIGHT,
JOHN A. HARTPENCE,
MASON TROWBRIDGE

Counsel for Appellee, COLGATE-PALMOLIVE-PEET COMPANY.

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CLERK

Supreme Court of the United States

OCTOBER TERM—1938

No. 311

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

COLGATE-PALMOLIVE-PEET COMPANY,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

MOTION TO ENLARGE RECORD.

ALBERT C. WALL,
THOMAS G. HAIGHT, and
JOHN A. HARTPENCE,
Counsel for Appellee.

Supreme Court of the United States,

OCTOBER TERM—1938.

No. 311.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

OLGATE-PALMOLIVE-PEET COMPANY,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

MOTION TO ENLARGE RECORD.

Now comes Colgate-Palmolive-Peet Company, defendant this cause in the United States District Court for the strict of New Jersey, which is now pending in this Court appeal by the above-named Appellant, and respectfully ves that this Honorable Court make its order to enlarge e record herein in the respects hereinbelow specified, and necessary to that end to issue its writ of certiorari com-nding the said District Court to certify and send to this urt a proper and complete transcript of the records so reinbelow specified.

The aforesaid additional records are as follows:

1. Memorandum opinion of the United States District Court filed January 14, 1937, in *United States* vs. *Durkee Famous Foods, Inc.* (No. 6821-b), supporting the order referred to in the plea in bar and answer herein quashing the previous indictment herein (Criminal No. 6817-b).

2. Correcting memorandum opinion of said United States District Court filed January 25, 1937, correcting the above mentioned opinion (Criminal No. 6821-b).

3. Motion to quash said previous indictment, filed on or about July 19, 1934 (Criminal No. 6817-b), referred to in the plea in bar and answer herein.

4. Prior indictment herein in said United States District Court returned and filed at the April 1934 term of said District Court (Criminal No. 6817-b), though Appellee is ready to stipulate that only paragraph 4 of Counts 1, 2, 8, 9, and 10, paragraph 1 of Counts 3, 4, 5, and 6, and paragraph 3 of Count 7, of said prior indictment, be included in the printed record in this Court.

The following are the reasons and grounds upon which Appellee bases this motion:

1. Without the aforesaid records this Court cannot fully consider and determine one of the principal contentions relied upon by appellee upon its plea in bar in the District Court, i. e. whether the prior indictment was quashed because it was "found defective or insufficient" and, therefore, whether the indictment herein is saved from the bar of the three-year statute of limitations (18 U. S. Code Sec. 582) by the saving statute, Title 18 U. S. Code Sec. 587 (May 10, 1934 c. 278, Sec. 1, 48 Stat. 772) providing as follows:

> "Whenever an indictment (prior indictment) is found *defective* or *insufficient* for any cause, after the period prescribed by the applicable statute of limitations has expired, a *new* indictment may be returned at any time during the next succeeding term of court following such finding, during which a grand jury thereof shall be in session" (The words in parenthesis and italics ours).

n order to determine whether or not the prior indict nent as "found defective or insufficient" (within the meaning f said saving statute) and hence whether said saving tatut applies, it is necessary to examine and consider he above mentioned records, i. e. the said opinion support- ng the order quashing said prior indictment, the motion nd factual elements on which said order was based, and o much of said prior indictment as is material to said nquiry.

Defendant-Appellee urged in said District Court herein pon said plea in bar, and will urge in this Court, that aid prior indictment was quashed because it appeared by he motion to quash that the tariff (which was alleged to have been rebated) contained a vital condition precedent hich the prior indictment failed to allege and, therefore, was in a vital respect different from the tariff as alleged in he indictment, so that the ground for quashing said indict- ment was not that the indictment was "found defective or insufficient" within the meaning of said saving statute, but rather that the Court found that the allegation of the indict- ment was not supported by the facts, so that the quashing and dismissal was upon the factual merits rather than for mere insufficiency or defect in form of pleading.

While the District Court did not expressly accept or reject this contention, but, instead, apparently based its present order quashing the new indictment solely on the ground that it was returned at the *same* term of court instead of the term next succeeding the term at which the prior indictment was quashed, nevertheless, the contention involves the construction of the Act of May 10, 1934, *supra*, on which the new indictment is based and should be con- sidered and decided by this Court.

2. The plea in bar herein contains an allegation as to the aforesaid opinion quashing said prior indictment, and the basis therefor, which allegation is denied in the answer of the United States to said plea in bar, and it is necessary that this Court examine and consider said opinion on said

prior indictment, as well as the said motion, factual elements, and prior indictment itself, in order to determine whether or not, for the reason stated above, said saving statute exonerates the present indictment from the bar of the statute of limitations.

3. The Solicitor General has (in his letter dated October 4, 1938) authorized this Appellee to state to this Court that though he does not agree with the contentions of the Appellee, he has no objection to the granting of this motion to enlarge the record.

4. The present plea in bar herein was argued in conjunction with the argument of like pleas in No. 309 and No. 310 of the October Term, 1938, of this Court, and the Memorandum of the court below dismissing the indictments is captioned in the three cases, viz.:

UNITED STATES OF AMERICA *v.* DURKEE FAMOUS FOODS, INC.	CRIMINAL No. 7918b.
UNITED STATES OF AMERICA *v.* MANHATTAN LIGHTERAGE CORPORATION.	CRIMINAL No. 7919b.
UNITED STATES OF AMERICA *v.* COLGATE-PALMOLIVE-PEET COMPANY.	CRIMINAL No. 7920b.

A separate order, however, was entered in each case.

In the subsequent proceedings with regard to the record on appeal and the communications by counsel for the respec-

five defendants wit' the United States Attorney and the Solicitor General of the United States, Counsel herein collaborated with Counsel in Nos. 309 and 310, and to avoid prolixity and confusion separate communications were not made in the several cases but the communications in general were made to apply to all. The letter of the Solicitor General dated October 4, 1938, and the letter of counsel to him of September 27th, 1938, to which the Solicitor General's reply was addressed, are both captioned in the three cases.

We therefore respectfully refer this court to the motions to enlarge the record in Nos. 309 and 310, which are submitted together herewith, and to consider this motion in conjunction with the like motions submitted in those cases.

Respectfully submitted,

ALBERT C. WALL,
THOMAS G. HAIGHT, and
JOHN A. HARTPENCE,
Counsel for Appellee.

pp. 1, 2 + 3.

SUPREME COURT OF THE UNITED STATES.

Nos. 309, 310, 311—October Term, 1938.

The United States of America, Appellants, vs. Durkee Famous Foods, Inc. (309)	Appeals from the District Court of the United States for the District of New Jersey.
The United States of America, Appellants, vs. Manhattan Lighterage Corporation. (310)	
The United States of America, Appellants, vs. Colgate-Palmolive-Peet Company. (311)	

[January 30, 1939.]

Mr. Justice McReynolds delivered the opinion of the Court.

The identical questions involved in these three cases require consideration of the Act ~~November 17, 1921 (Ch. 124, 42 Stat. 220,~~ U. S. C. Title 18 sec. 582) which prescribes a three year limitation for offenses not capital, also the Act May 10, 1934 (Ch. 278, 48 Stat. 772, U. S. C. Title 18 sec. 587) which specifies the time during

December 27, 1927, (Ch. 6, 45 Stat. 51,

~~Chapter 124. An Act To amend section 1044 of the Revised Statutes of the United States relating to limitations in criminal cases.~~

~~*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section 1044 of the Revised Statutes of the United States be amended so as to read as follows:~~

~~"Sec. 1044. No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section 1046, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed: *Provided, however*, That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, the period of limitation shall be six years. This Act shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but this proviso shall not apply to acts, offenses, or transactions which are already barred by the provisions of existing laws."~~

~~Sec. 2. That this Act shall be in force and effect from and after the date of its passage.~~

~~Approved, November 17, 1921.~~

which a new indictment may be returned after the first is found to be defective or insufficient for any cause.[2]

Reference to the facts disclosed by the Record in No. 309 will suffice.

During the April term 1934 the Grand Jury for the District of New Jersey returned an indictment charging appellee with violation of the Elkins Act (February 19, 1903, Ch. 708, 32 Stat. 847, U. S. C. A. Title 49 sec. 41) on August 17, 1932. A motion to quash this was sustained, February 2, 1937, during the January, 1937 term. Later in the same term—April 9, 1937—the Grand Jury returned a second indictment against appellee based on the same facts and containing the same charges as those specified in the 1934 indictment.

To the second indictment appellee interposed what it designated a plea in bar. This alleged (1) that as the offense charged was committed more than three years preceding the return of the pending indictment prosecution was barred by the statute of limitations: (2) that the new indictment was not returned in conformity with the Act May 10, 1934 (note 2, *supra*), since it was reported at the term during which the first indictment was found defective—not at the succeeding one. This plea was sustained and the cause is here by direct appeal.

Counsel for appellants submit—

The Act May 10, 1934 prevented the bar of the statute of limitations from becoming effective until the end of the term next suc-

[2] Chapter 278:—An Act To limit the operation of statutes of limitations in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever an indictment is found defective or insufficient for any cause, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned at any time during the next succeeding term of court following such finding, during which a grand jury thereof shall be in session.

Sec. 2. Whenever an indictment is found defective or insufficient for any cause, before the period prescribed by the applicable statute of limitations has expired, and such period will expire before the end of the next regular term of the court to which such indictment was returned, a new indictment may be returned not later than the end of the next succeeding term of such court, regular or special, following the term at which such indictment was found defective or insufficient, during which a grand jury thereof shall be in session.

Sec. 3. In the event of reindictment under the provisions of this Act the defense of the statute of limitations shall not prevail against the new indictment, any provision of law to the contrary notwithstanding.

Sec. 4. The provisions of this Act shall not apply to any indictment against which the statute of limitations has run at the date of approval hereof.

Approved, May 10, 1934.

eding that during which the first indictment was quashed. The ling of the trial court (1) is contrary to the purpose of the Act nd not required by its language; (2) is contrary to the policy and ustrates the general object of the statute of limitations "to en- urage promptitude in the prosecution of remedies"; (3) creates nnecessary inconsistency between the two sections of the Act, and sults in an illogical and unreasonable break within the period of mitation.

The Act of 1934 was passed upon recommendation of the Senate diciary Committee whose report stated that the purpose of the ill was set out in a letter from the Attorney General which it noted.

Inspection of this letter shows quite plainly that the bill as nally enacted undertook to do exactly what the Attorney General sked. The language is apt to express that purpose and we are with- ut authority, by interpretation, to give the statute another eaning.

The challenged judgments must be affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

January 17, 1934.

lon. Henry F. Ashurst,
Chairman Committee on the Judiciary,
United States Senate,
Washington, D. C.

y Dear Senator:

In some criminal cases the offense is not discovered until the statute of mitations has nearly run. In other cases defendants are not apprehended for me time or removal proceedings are instituted and appeals taken from habeas rpus orders refusing to release the defendant on removal order, and in still her cases dilatory motions are made with the hope that, if ultimately sus- ined, the statute of limitations will meanwhile have run against another osecution. To safeguard the interests of the Government in such cases, islation is recommended providing that in any case in which an indictment found defective or insufficient for any cause, after the period prescribed by statute of limitations has run, or where said period of limitations has not but will expire before the end of the next regular session of court, a new lictment may be returned at any time during the first succeeding term of rt at which a grand jury is in session. The judicial conference favors islation of this tenor.

A draft of bill to effectuate this recommendation is enclosed herewith and I ll appreciate it if you will introduce it and lend it your support.

Respectfully,
HOMER CUMMINGS,
Attorney General.